DOCKET

SUPREME COURT
OF THE UNITED STATES

No. 09-367
Title: Brian Russell Dolan, Petitioner
v.
United States
Docketed: September 28, 2009
Lower Ct: United States Court of Appeals for the Tenth Circuit
Case Nos.: (08-2104)
Decision Date: May 27, 2009
Rehearing Denied: June 29, 2009
Questions Presented

~~Date~~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~
Sep 23 2009	Petition for a writ of certiorari filed. (Response due October 28, 2009)
Oct 19 2009	Order extending time to file response to petition to and including November 27, 2009.
Nov 27 2009	Brief of respondent United States in opposition filed.
Dec 9 2009	DISTRIBUTED for Conference of January 8, 2010.
Dec 9 2009	Reply of petitioner Brian Russell Dolan filed. (Distributed)
Jan 8 2010	Petition GRANTED.
Feb 8 2010	Motion for leave to proceed further herein in forma pauperis and for appointment of counsel filed by petitioner Brian Russell Dolan.
Feb 16 2010	SET FOR ARGUMENT ON Tuesday, April 20, 2010.
Feb 17 2010	The time within which to file the joint appendix and petitioner's brief on the merits is extended to and including February 23, 2010.
Feb 17 2010	The time within which to file respondent's brief on the merits is extended to and including March 26, 2010.
Feb 23 2010	Brief of petitioner Brian Russell Dolan filed.
Feb 23 2010	Joint appendix filed.
Feb 24 2010	Motion DISTRIBUTED for Conference of March 19, 2010.
Mar 2 2010	Brief amicus curiae of National Association of Criminal Defense Lawyers filed.
Mar 12 2010	Record received from U.S.C.A. for 10th Circuit. (1 envelope)
Mar 18 2010	CIRCULATED.
Mar 22 2010	Motion for leave to proceed further herein in forma pauperis and for appointment of counsel GRANTED. Pamela S. Karlan, Esq., of Stanford, California, is appointed to serve as counsel for the petitioner in this case.
Mar 26 2010	Brief of respondent United States filed. (Distributed)

Apr 1 2010	Brief amicus curiae of National Crime Victim Law Institute filed. (Distributed)
Apr 13 2010	Reply of petitioner Brian Russell Dolan filed. (Distributed)
Apr 16 2010	Record received from U.S.D.C. for the Distrct of New Mexico. (There are sealed documents in this record)
Apr 20 2010	Argued. For petitioner: Pamela S. Karlan, Stanford, Cal. (Appointed by this Court.) For respondent: Toby J. Heytens, Assistant to the Solicitor General, Department of Justice, Washington, D. C.

PETITION FOR WRIT OF CERTIORARI

Supreme Court, U.S.
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No. 09-___

IN THE

Supreme Court of the United States

BRIAN RUSSELL DOLAN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a district court may enter a restitution order beyond the time limit prescribed in 18 U.S.C. § 3664(d)(5).

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Brian Russell Dolan respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit.

OPINIONS BELOW

The order of the Court of Appeals for the Tenth Circuit granting the petition for rehearing, adding a footnote to the original panel opinion, and denying the petition for rehearing en banc (App. 1a-3a) is unpublished. The opinion of the Court of Appeals for the Tenth Circuit as amended (App. 4a-26a) is published at 571 F.3d 1022. The district court's opinion (App. 27a-48a) is unpublished.

JURISDICTION

The order of the court of appeals denying petitioner's petition for rehearing en banc was filed on June 26, 2009. Pet. App. 1a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

The full text of 18 U.S.C. §§ 3663A and 3664 is set out in the Appendix at pages 49a-60a. Section 3663A(a)(1) provides that courts sentencing a defendant convicted of specified offenses shall order "restitution to the victim of the offense."

Section 3664(d)(5) provides:

> If the victim's losses are not ascertainable by the date that is 10 days prior to sentencing, the attorney for the Government or the probation officer shall so inform the court,

> and the court shall set a date for the final determination of the victim's losses, not to exceed 90 days after sentencing. If the victim subsequently discovers further losses, the victim shall have 60 days after discovery of those losses in which to petition the court for an amended restitution order. Such order may be granted only upon a showing of good cause for the failure to include such losses in the initial claim for restitutionary relief.

STATEMENT

The Mandatory Victims Restitution Act (MVRA), 18 U.S.C. § 3663A, provides that federal courts shall order restitution as part of the sentence in specified criminal cases. It further provides that an order of restitution "shall be issued and enforced in accordance with section 3664." *Id.* § 3663A(d). Section 3664 in turn provides that if the victim's losses cannot be obtained prior to sentencing, "the court shall set a date for the final determination of the victim's losses, not to exceed 90 days after sentencing." 18 U.S.C. § 3664(d)(5). This case presents the question, over which the courts of appeals are deeply and intractably divided, whether a district court can nonetheless issue a restitution order once the time period set by Section 3664(d)(5) has expired.

1. On September 9, 2006, on the Mescalero Indian Reservation in southeastern New Mexico, two tribe members, petitioner Brian Russell Dolan and Evan Ray Tissnolthtos, got into a fight. Tissnolthtos was seriously injured. When petitioner returned

home, he informed his sister about the fight. She immediately contacted Bureau of Indian Affairs police, who questioned and subsequently arrested petitioner. Neither petitioner, because he was intoxicated at the time, nor Tissnolthtos, because of his injuries, remembered the relevant events clearly.

2. Because the offense was committed in Indian country, petitioner was charged in the United States District Court with assault resulting in serious bodily injury. *See* 18 U.S.C. § 1153 (conferring federal jurisdiction over crimes within Indian country); *id.* § 113(a)(6) (governing assaults).

Petitioner pleaded guilty. The May 30, 2007, Presentence Investigation Report (PSR) prepared by the United States Probation Officer noted that the MVRA applied to the case. The PSR explained that Tissnolthtos had claimed lost wages, but had failed to provide any documentation to support the claim. Pet. App. 29a. It also indicated that Tissnolthtos's medical expenses had been covered by the Indian Health Service – an agency within the federal Department of Health and Human Services – but that the agency had not responded to "repeated requests for medical expenses borne by the agency for the victim's treatment." Pet. App. 29a.

The district court originally scheduled sentencing for June 28, 2007, but granted a continuance at the government's request until July 30, 2007, to allow the victim's sister to appear at the hearing. Pet. App. 29a n.2. At the July 30 hearing, the district court discovered that the amount of potential restitution had not yet been fixed, although the government

estimated that there was an outstanding hospital bill for roughly $80,000. Pet. App. 30a. Rather than postpone the sentencing or impose a restitution obligation on the basis of the preliminary information, the court proceeded to sentence petitioner to a term of twenty-one months' imprisonment and three years' supervised release. The court noted that it was leaving open the matter of restitution, pending the receipt of additional information, but planned to order restitution. *Id.* The judgment, entered on July 30, 2007, left blank the amount of restitution, stating that

> Pursuant to the Mandatory Restitution Act, restitution is applicable; however no information has been received regarding possible restitution payments that may be owed. Therefore, the Court will not order restitution at this time.

Pet. App. 31a.

Slightly more than two months later, the probation office prepared an addendum to the PSR containing detailed restitution information about the medical expenses the United States had incurred on the victim's behalf. Pet. App. 31a. Although the addendum noted that the MVRA required the court to fix the amount of restitution within 90 days after sentencing – that is, by October 28, 2007 – the court did not set a hearing until February 4, 2008, 190 days after the original sentencing. Pet. App. 32a.

At the February 4 hearing, petitioner argued that the district court lacked the power to impose restitution because the 90-day period provided for in

Section 3664(d)(5) had lapsed. Pet. App. 32a. After ordering additional briefing, the district court set a final hearing for April 11, 2008. Pet. App. 32a. Following that hearing, on April 24, 2008, 270 days after petitioner had been sentenced, the district court held that despite the expiration of the 90-day period, it had the power to require petitioner to pay restitution and it ordered him to pay $104,649.78 in restitution to the federal government in payments of $250 per month. Pet. App. 48a.

In the opinion accompanying its restitution order, the district court noted that "the United States Courts of Appeal have not reached a consensus on the true effect of the 90-day requirement" and that they "differ[ed] over whether a district court has the authority to order restitution after the 90-day interval has elapsed." Pet. App. 35a. After reviewing "the vast array of positions taken by the circuit courts," Pet. App. 42a, it declined to adopt a plain language reading of Section 3664(d)(5). Instead, it "look[ed] to Congressional intent to decipher the true meaning of Section 3664(d)(5)." Pet. App. 42a. Because the MVRA was intended to provide restitution to victims, "[a]llowing a defendant to escape restitution simply because of a fortuitous chain of events would hardly serve the interests of justice." Pet. App. 43a.

3. Petitioner appealed to the Tenth Circuit, renewing his claim that the district court lacked the

ability, once the 90-day period of Section 3664(d)(5) had expired, to order restitution.[1]

The court of appeals affirmed. It rejected the claim that Section 3664(d)(5)'s 90-day deadline was "jurisdictional," in the sense that "the district court's power to enter any restitution order expired 90 days after [petitioner's] sentencing." Pet. App. 9a (emphasis omitted). Instead, the court of appeals embraced a "better-late-than-never principle," Pet. App. 13a, that it found rooted in "[t]he plain language of the Act, longstanding canons of construction, the MVRA's legislative history, and [its] own case law," Pet. App. 9a.

The court of appeals' analysis began by referring to the MVRA's directive that "*[n]otwithstanding any other provision of law*, when sentencing a defendant convicted of [an offense covered by the Act], the court *shall* order . . . restitution." Pet. App. 9a (quoting 18 U.S.C. § 3663A(a)(1) (emphasis and alterations the court's)). It reasoned that the obligation to order restitution thus "overr[ode] conflicting provisions of any other section" of the Act, including the time limits of Section 3664(d)(5). Pet. App. 10a (quoting *Cisneros v. Alpine Ridge Group*, 508 U.S. 10, 18 (1993)). It also relied on the title of Section 3664 – "*Procedure* for issuance and enforcement of order of restitution." Pet. App. 9a (quoting 18 U.S.C. § 3664

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[1] Petitioner also challenged the restitution payment schedule ordered by the district court, but he does not raise that issue here.

(emphasis added by the court)). The use of the word "procedure" indicated that Section 3664(d)(5) was not a jurisdictional statute, but was simply a "claims processing" rule. Pet. App. 11a.

Second, with respect to canons of statutory construction, the court of appeals pointed to a principle against "readily infer[ring] congressional intent to limit an agency's power to get a mandatory job done merely from a specification to act by a certain time." Pet. App. 12a (quoting *Barnhart v. Peabody Coal*, 537 U.S. 149, 160 (2003)). Although Section 3664(d)(5) required restitution to be ordered within 90 days, it had "no other language purporting to deny district courts the authority to enter late restitution orders." Pet. App. 13a.

Third, the court of appeals asserted that the MVRA's legislative history reinforced its conclusion. The Senate Committee Report accompanying the Act, it declared, "makes plain that its emphasis on the need for speed and finality arises out of concern for victims, not victimizers." Pet. App. 16a. Quoting its prior decision in *United States v. Dando*, 287 F.3d 1007, 1010 n.4 (10th Cir. 2002), the court declared that "Congress intended the 90 day limitation period to protect victims against the dissipation of defendants' assets and not to protect defendants from a drawn-out sentencing process or to establish finality." Pet. App. 17a.

In light of its analysis, the Tenth Circuit adopted a position that it described as "consistent . . . with the decisions of the First, Second, Fourth, and Ninth Circuits, each of which has held, as we do, that the

passing of § 3664(d)(5)'s deadline does not toll the death knell of the district court's subject matter jurisdiction." Pet. App. 18a (citing cases from those circuits). It noted, however, that there were decisions from other circuits taking a range of positions, some permitting and others precluding the imposition of restitution after the 90-day period had run. Pet. App. 19a n. 2 (citing cases from the Sixth, Seventh, and Eleventh Circuits).

4. Petitioner moved for rehearing and rehearing en banc. The panel granted the petition for rehearing "for the limited purpose" of adding a footnote to its original opinion to address petitioner's claim that its opinion conflicted with an earlier Tenth Circuit case, *United States v. Bedonie*, 413 F.3d 1126 (10th Cir. 2005). Pet. App. 1a. The petition for rehearing en banc was denied. Pet. App. 3a.

5. This petition follows.

REASONS FOR GRANTING THE WRIT

This case presents the Court an opportunity to resolve an ever-widening circuit split on an important and recurring question of federal law. The courts of appeals have adopted at least three distinct positions with respect to the power of district courts to order restitution outside of the 90-day window provided for in Section 3664(d)(5).

The question whether district courts have the power to order restitution without complying with the procedures laid out in Section 3664(d)(5) is an important one. Federal courts order restitution in thousands of cases each year and the consequences of

district courts' failure to adhere to the strictures of Section 3664(d)(5) has produced a steady stream of litigation reaching inconsistent results. Petitioner's challenge to the order in this case would have succeeded in at least three circuits and the likely outcome is unclear in yet a fourth. This case presents an ideal vehicle both to resolve the issue and to clarify that the plain language of Section 3664(d)(5) precludes district courts from ordering restitution outside the time limits set by Congress.

I. The Courts Of Appeals Are Deeply Divided Over The Power Of District Courts To Order Restitution Outside Of The Time Limits Set By Section 3664(d)(5).

As acknowledged by both the Tenth Circuit in this case, Pet. App. 19a n.2, and the Eighth Circuit only one week later in *United States v. Balentine*, 569 F.3d 801, 803 (8th Cir. 2009), courts of appeals have reached "varying results" with respect to the question whether district courts can order restitution even if they fail to comply with the procedures of Section 3664(d)(5). "Varying" is an understatement. The courts of appeals are deeply, increasingly, and intractably fractured over the proper construction of a statute that comes into play thousands of times each year.

A. The Conflict Among The Courts Of Appeals Is Widespread And Longstanding.

A majority of the courts of appeals have now weighed in on the validity of restitution orders that are issued more than ninety days after a defendant

has been sentenced. Their answers differ strikingly. The Seventh and Eleventh Circuits do not permit district courts to issue such orders. The Third Circuit permits such orders only by tolling the 90-day period in cases where the defendant is responsible for the delay. The Second and Ninth Circuits apply a prejudice standard to untimely orders (with the Second also adopting a tolling rule, but for a different class of cases than those tolled by the Third Circuit). The Sixth Circuit's position seems to be that restitution orders issued more than ninety days after sentencing are permissible in cases where some restitution was ordered within the period established by Section 3664(d)(5). Finally, the Eighth and Tenth Circuits seem prepared to uphold all restitution orders, without regard for their compliance with Section 3664(d)(5).

1. ***The Seventh and Eleventh Circuits.*** The Seventh and Eleventh Circuits have adopted a straightforward interpretation of Section 3664(d)'s 90-day provision. They have held that a district court does not have the power to order restitution if it fails to follow the time limit imposed by Section 3664(d)(5).

In *United States v. Farr*, 419 F.3d 621 (7th Cir. 2005), the defendant was sentenced in 2001 to a term of imprisonment; the judgment directed "that restitution was 'to be determined' and that the 'determination of restitution is deferred to unknown [sic].'" *Id.* at 622. More than two years later, the probation office discovered that the restitution had never been ordered. When the district court was informed, it ordered Farr to pay roughly $200,000 in

restitution as a condition of his supervised release. *Id.* at 623.

The Seventh Circuit reversed, and held that the "plain language" of Section 3664(d)(5) denied the district court the power to order restitution. 419 F.3d at 625. "[F]ederal courts possess no inherent authority to order restitution, and may do so only as explicitly empowered by statute." *Id.* at 623 (quoting *United States v. Donaby*, 349 F.3d 1046, 1052 (7th Cir. 2003)). When "courts are expressly directed to comply with the procedures set forth in § 3664," *Farr*, 419 F.3d at 625, they are empowered to order restitution only if they follow its timing requirements. Save in one, statutorily provided circumstance involving newly discovered losses after entry of a restitution order, a district court does not have authority to order restitution once the 90-day period had passed.[2]

The Seventh Circuit firmly rejected any argument from legislative purpose:

> [G]iven the clear time limit set forth in § 3664(d)(5), it cannot be said that it was Congress's intent to allow district courts to order restitution at any time. The statutory

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[2] The Seventh Circuit recognized that there could be limited circumstances "which would restart the ninety-day period so that a new order of restitution could be issued in compliance with § 3664(d)(5)'s time limit," 419 F.3d at 625, but emphasized that the cases in which this occurred involved timely, but otherwise flawed, restitution orders.

> language in § 3664(d)(5) sets forth an unambiguous requirement that courts ordering restitution as a condition of supervised release do so within ninety days of sentencing. We may not overlook the statute's plain language to further what may be a broader statutory purpose. *See Barnhart v. Sigmon Coal Co., Inc.*, 534 U.S. 438, 461-62 (2002) (when statutory language is unambiguous, courts must apply the plain meaning and not speculate that the legislature intended to say something different).

Id. at 625.

The Eleventh Circuit has repeatedly taken the same categorical approach as the Seventh Circuit. In January 2000, the defendant in *United States v. Maung*, 267 F.3d 1113 (11th Cir. 2001), was sentenced to a term of imprisonment followed by supervised release. The judgment "ordered him to pay restitution, but it deferred determination of the amount of restitution 'pending further hearing.'" *Id.* at 1117. More than six months later, after a period during which active negotiations over the amount of restitution had occurred, the Government sought a restitution order. Over the defendant's objection that Section 3664(d)(5) did not permit such an order because more than ninety days had passed since his sentencing, the district court entered an order requiring Maung to pay over $200,000 in restitution and amended its final judgment to incorporate that amount. 267 F.3d at 1117.

The Eleventh Circuit reversed the restitution order "because it was untimely." *Id.* at 1114. Like the Seventh Circuit, the Eleventh construed the "plain language of the statute" as authorizing district courts to order restitution only within ninety days of sentencing. *Id.* at 1122. In interpreting a statute, a court should look beyond "the plain meaning of its words" only if "the statutory text is unclear" or the plain language "produces a result that is not just unwise but is clearly absurd." *Id.* at 1121 (internal quotation marks omitted). Neither circumstance obtained here: "The requirement, plain on the face of § 3664(d)(5), that a district court enter a restitution order within 90 days of sentencing, and not thereafter, generally will not produce an absurd result." *Id.* at 1122. The Eleventh Circuit hypothesized that the "strict 90-day limit" might be equitably tolled in cases where a defendant's "bad faith delay" prevented a court from complying with Section 3664(d)(5). 267 F.3d at 1122. But it rejected the Government's argument that the statute should be tolled to fulfill a broad congressional purpose. It also rejected the Government's argument that untimely restitution orders should be permitted absent a showing of prejudice to the defendant:

> [T]here is no prejudice requirement in the statute, and we are not convinced that we should read one into it. . . . [W]e are governed by the language Congress enacts, not by purported designs or intentions that conflict with that language. *See INS v. Cardoza-Fonseca*, 480 U.S. 421, 452-53 (1987) (Scalia,

> J., concurring) ("Judges interpret laws rather than reconstruct legislators' intentions.").

Id. at 1121. Thus, the Eleventh Circuit "let the chips fall where the plain language of the statute indicates they should." *Id.* at 1122.

The Eleventh Circuit has repeatedly adhered to its position. *See, e.g.*, *United States v. Kapelushnik*, 306 F.3d 1090, 1093-94 (11th Cir. 2002) (stating that when a district court "fails to make [a determination fixing the amount of restitution] within the 90-day limitations period, the judgment of conviction becomes final and contains no enforceable restitution provision"); *United States v. Raphael*, 181 Fed. Appx. 900, 901 (11th Cir. 2006) (per curiam) (same).

2. *The Second, Third, and Ninth Circuits.* Three other courts of appeals have recognized that Section 3664(d)(5) limits a district court's power to order restitution, but have nonetheless affirmed particular restitution orders either by tolling Section 3664(d)(5)'s 90-day limit or by treating violations of the deadline as harmless error.

a. *Tolling.* The Second Circuit has permitted tolling of the 90-day limit in a case where the defendant's bad-faith actions interfered with the sentencing court's ability to comply with Section 3664(d)(5). In *United States v. Stevens*, 211 F.3d 1 (2d Cir. 2000), *cert. denied sub nom. Gall v. United States*, 531 U.S. 1101 (2001), the district court initially sentenced Gall to incarceration, supervised release, and restitution, postponing the restitution order and directing the defendant to produce various documentation that would enable the court to fix the

amount. *Id.* at 3. Because Gall "stonewall[ed]" and "'flout[ed] the authority of the court' by concealing assets," *id.* at 4, the district court did not enter the restitution order until 117 days after the sentencing.

On appeal, the Second Circuit upheld the restitution order. In light of the statutory purpose, "Congress could not have intended to permit offenders to subvert the [restitution requirement] by using dilatory maneuvering to defeat a sentence of restitution. . . . [T]o vacate the restitution order where the defendant himself ran out the 90-day clock would be to reward him for willful defiance of the court's orders." *Id.* at 4-5. Thus, the Second Circuit "h[e]ld that the 90-day clock in § 3664(d)(5) may be tolled by the defendant's own purposeful misconduct." *Id.* at 5.

In *United States v. Terlingo*, 327 F.3d 216 (3d Cir. 2003), the Third Circuit offered a different tolling rule. It described the Second (and Tenth) Circuits as permitting tolling only when a defendant had acted in bad faith, *see id.* at 219 (citing *United States v. Stevens*, 211 F.3d 1 (2d Cir. 2000), and *United States v. Dando*, 287 F.3d 1007 (10th Cir. 2002)), and suggested that the Eleventh Circuit had left open that possibility.[3] The Third Circuit decided, however,

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[3] While the Eleventh Circuit has not actually used principles of tolling to affirm an untimely restitution order, it declined in *Maung* to say that Section 3664(d)(5) "can never be equitably tolled." *Maung*, 267 F.3d at 1122. It declined to toll the 90-day limit in Maung's case because the delay "was not caused by obstruction or bad faith tactics of the defendant" and there was

that in light of the statutory purposes, "even in the absence of any bad faith behavior the statute must be equitably tolled when the delay is caused in significant part by the defendant." 327 F.3d at 222. At the same time, it squarely stated that "[i]f the defendant played no significant part in causing the delay, however, equitable tolling will not be available." *Id.*

b. *Prejudice requirements.* In contrast to the Eleventh Circuit, which squarely refused to import a prejudice standard into Section 3664(d)(5),[4] the Second Circuit has "held that an extension of the proceedings beyond the 90-day period provides no basis for vacating the restitution order unless the defendant can show that the extension caused him actual prejudice." *United States v. Douglas*, 525 F.3d 225, 252-53 (2d Cir. 2008); *see also, e.g.*, *United States v. Zakhary*, 357 F.3d 186, 191 (2d Cir.), *cert. denied*, 541 U.S. 1092 (2004); *Stevens*, 211 F.3d at 5-6.

The Ninth Circuit has also adopted a prejudice standard. In *United States v. Marks*, 530 F. 3d 799 (9th Cir. 2008), for example, the court relied on the purpose and legislative history of the MVRA to conclude that "the failure to comply" with the "procedural requirements" of Section 3664(d)(5) "is

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"no indication that the defendant was any more at fault for the delay than the government." *Id.*

[4] The Eighth Circuit has also expressly rejected a prejudice standard. *See infra* page 20.

harmless error absent actual prejudice to the defendant." 530 F.3d at 812 (quoting *United States v. Cienfuegos*, 462 F.3d 1160, 1163 (9th Cir. 2006)); *see also United States v. Moreland*, 509 F.3d 1201, 1224 & n.6 (9th Cir. 2007) (applying harmless-error review to violations of Section 3664(d)(5) while noting the contrary approach of the Seventh Circuit in *Farr*), *vacated and remanded on other grounds*, 129 S. Ct. 997 (2009).[5]

3. ***The Sixth Circuit.*** The Sixth Circuit has issued a series of decisions that have treated restitution orders entered more than ninety days after sentencing differently depending on whether an initial order was entered within the period provided by Section 3664(d)(5).

In *United States v. Vandeberg*, 201 F.3d 805 (6th Cir. 2000), for example, the court was confronted with a situation in which, although an initial restitution order was entered within ninety days of sentencing, the district court later amended the order after the ninety days had run. The Sixth Circuit held that the district court had erred "by unilaterally

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[5] In a case concerning a different aspect of Section 3664(d)(5) – its requirement that notice of the amount of restitution sought be provided ten days before sentencing – the Fourth Circuit suggested in dicta that it would apply a harmless-error requirement to violations of the 90-day rule. *See United States v. Johnson*, 400 F.3d 187, 199 (4th Cir. 2005) (stating that "just as the failure to conform with the ninety-day limit constitutes harmless error absent prejudice, so too does the failure to comply with the ten-day limit").

amending and finalizing the restitution order without affording the parties an opportunity to object within the 90-day period." *Id.* at 814. Nonetheless, it affirmed the revised restitution order because the error was "harmless." *Id.* Because "[t]he MVRA permits amendments to restitution orders to reflect changed circumstances, [it] neither confers nor terminates a court's jurisdiction." *Id.*

In *United States v. Jolivette*, 257 F.3d 581 (8th Cir. 2001), by contrast, the Sixth Circuit confronted a case in which the district court's initial sentence, while it had indicated a plan to order restitution, had failed to set any amount within the 90-day period. It concluded that because "[a] federal court's power to order restitution is circumscribed by statute," once the "statutory deadline for calculating the amount of restitution due has passed," a district court could not, "consistent with the terms of the statute, set an amount of restitution." *Id.* at 583-84. The court found reinforcement for its conclusion in the rule of lenity:

> We believe that the statute makes clear the congressional intent to prohibit courts from making restitution determinations after the statutory period has run. But even if we found Congress's silence on the issue of what occurs if, as in this case, the court does not make such a determination, we would apply the well-settled rule requiring that any ambiguity in criminal statutes be resolved against the government and in favor of the criminal defendant. *Staples v. United States*, 511 U.S. 600, 619 n.17 (1994) (rule of lenity

> requires that "ambiguous criminal statutes ... be construed in favor of the accused").

Id. at 584. In short, "because there was no timely judicial determination of the restitution amount, the judgment contains no enforceable restitution provision." *Id.*

The Sixth Circuit's most recent decision, *United States v. Bogart*, 2009 U.S. App. LEXIS 18126 (6th Cir. 2009), involved a revised order. The case involved a complex, multi-defendant fraud. In July 2004, the district court sentenced Bogart, ordering him to pay more than $3.3 million in restitution. Bogart subsequently filed a motion challenging the restitution order because the court had not determined the exact portion of the victims' losses for which he was responsible. After holding a hearing in April 2006 regarding the restitution obligations of each of the conspirators, in June 2007 the district court issued an opinion finding Bogart jointly and severally liable for only $2.5 million in restitution and ordering him to repay that amount at the rate of $500 per month.

On appeal, Bogart challenged the restitution order as untimely. The court of appeals affirmed. It distinguished *Jolivette* on the grounds that that case had arisen in the context of "a district court's failure to set *any* restitution amount." 2009 U.S. App. LEXIS 18126 at *16-17 (emphasis in the original). By contrast, in Bogart's case, there had been a timely restitution order, albeit one modified outside the 90-day limit. This made Bogart's case resemble

Vandeberg which, the court of appeals declared, had applied a harmless-error standard. *See id.* at *17-20.

4. *The Eighth Circuit.* By contrast, the Eighth Circuit in its recent opinion in *United States v. Balentine*, 569 F.3d 801 (8th Cir. 2009), squarely rejected the tolling and harmless-error approaches. *Id.* at 805 (stating that "Section 3664(d)(5) unambiguously imposes a 90-day time limit on restitution orders" and joining the Eleventh Circuit's rejection of a prejudice requirement). Nonetheless, it affirmed a district court's untimely restitution order under an entirely different theory that was based on this Court's decision in *United States v. Montalvo-Murillo*, 495 U.S. 711 (1990), a Bail Reform Act case. There, in the context of deciding that a court's failure to comply with the BRA's prompt hearing provisions did not require the release of a dangerous defendant, this Court pointed out that the Act was "silent on the issue of a remedy for violations of its time limits," *id.* at 716. In light of this fact and the general principle that the public interest should not be "prejudiced by the negligence of the officers or agents to whose care they are confided," *id.* at 718 (quoting *Brock v. Pierce County*, 476 U.S. 253, 260 (1986)), the court held violations of the prompt hearing provisions did not require release of individuals who should otherwise be detained. The Eighth Circuit adopted an identical rule with respect to Section 3664(d)(5) violations: "In light of Congress' clear intent to effectuate important public policy," Section 3664(d)(5) did not "divest the court of authority to order restitution if the timing provision was breached." 569 F.3d at 807. It ended

its discussion by quoting, with approval, from the Tenth Circuit's decision in this case. *Id.*[6]

5. ***The Tenth Circuit.*** In this case, the Tenth Circuit recognized that the district court's restitution order "was undoubtedly late, coming after the deadline prescribed by the Mandatory Victims Restitution Act." Pet. App. 5a. Nonetheless, it held that the order was "not an invalid one." Pet. App. 5a. It circumscribed Section 3664(d)(5)'s deadline with "the better-late-than-never principle." Pet. App. 13a.

The Tenth Circuit's approach thus conflicts with the rule adopted and applied by the Seventh and Eleventh Circuits. In those circuits, an untimely restitution order is invalid because district courts simply lack statutory authorization to order restitution except in compliance with Section 3664(d)(5).

The Tenth Circuit's approach also conflicts with the approach taken by the Third Circuit. There would be no need to discuss principles of tolling if orders entered outside the time period set by Section 3664(d)(5)'s deadline are presumptively valid. If, as the Tenth Circuit assumed, a district court retains

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[6] Somewhat puzzlingly, in light of its rejection of the harmless-error approach adopted by the Second and Ninth Circuits, the Eighth Circuit stated that it was not "decid[ing] today what, if any, remedies may be available to a defendant actually harmed by a district court's failure to abide by § 3664(d)(5)'s timing provisions." 569 F.3d at 807.

the power to order restitution at any time, there would be no need to stop the 90-day clock.

And the Tenth Circuit's rule conflicts with the Sixth Circuit's approach in *Jolivette* regarding the appropriate test for cases in which no restitution order was timely entered, as opposed to cases involving later revisions of restitution orders initially imposed within the 90-day window of Section 3664(d)(5).[7]

Moreover, while the Tenth Circuit acknowledged that "some of our sister circuits have held out the possibility that, if a defendant could establish prejudice arising from the district court's failure to enter restitution within the 90-day deadline, they might well craft some remedy to address any such prejudice," Pet. App. 20a (citing *Moreland* and

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[7] In *United States v. Cheal*, 389 F.3d 35 (1st Cir. 2004), the court of appeals upheld a restitution order entered 127 days after sentencing. The defendant, however, had not timely objected to the district court's plan, and thus the court of appeals reviewed the order only for plain error. *See id.* at 48. Citing the Sixth Circuit's decision in *Vandeberg*, the First Circuit rejected the defendant's claim that Section 3664(d)(5) was jurisdictional:

> This jurisdictional argument is undermined by § 3664's provision for continued revision of the restitution order in light of later discoveries of losses. Indeed, the title of the provision ("Procedure for issuance and enforcement of order of restitution") advertises its procedural nature, including the 90-day time frame.

Id. at 48-49.

Johnson), it expressed skepticism that a defendant could be relieved of an order to pay restitution "under *any* circumstances." *Id.* (emphasis added).

B. The Courts Of Appeals Are Incapable Of Resolving This Frequently Recurring Conflict.

The decisions discussed in Part I(A) of this petition show that courts of appeals have repeatedly been confronted with questions regarding Section 3664(d)(5)'s 90-day deadline. That is hardly surprising. According to the U.S. Sentencing Commission, in fiscal year 2008, district courts ordered restitution in more than 10,000 cases. *See* U.S. Sentencing Commission, Sourcebook of Federal Sentencing Statistics, tbl. 15 (13th ed. 2008).

What the courts of appeals' opinions reveal, beyond the fact that issues regarding untimely restitution orders arise frequently and have produced a deep and wide circuit split, is that the lower courts' decisions are not converging on a consistent approach. Lower courts are well aware of the differing approaches. Many opinions contain surveys of the "varying results," *Balentine*, 569 F.3d at 803, reached in prior cases. *See also, e.g.*, *Terlingo*, 327 F.3d at 219-22; *Farr*, 419 F.3d at 626; Pet. App. 34a-40a. And the courts of appeals often acknowledge that the decision they are reaching in a particular case is inconsistent with the decisions reached by other courts. Just as telling, perhaps, are cases in which one court of appeals goes out of its way to declare that another court of appeals' decision claiming to be in harmony has in fact misconstrued the first court's approach. *See, e.g.*, *Farr*, 419 F.3d at

626 n.3 (stating that the Fourth Circuit had erred in *United States v. Johnson*, 400 F.3d 187 (4th Cir. 2005), in "attributing [the] holding" that "district courts can enter restitution orders more than ninety days after sentencing provided that the delay does not prejudice the defendant" to the Seventh Circuit's decision in *United States v. Pawlinski*, 374 F.3d 536 (7th Cir. 2004)).

The fact that this year, three courts of appeals have confronted the issue yet again, have rejected the approaches taken by prior courts, and have propounded new rules demonstrates that the question has percolated long enough and this Court's intervention is warranted.

C. This Case Presents The Right Opportunity For Resolving The Conflict.

This case presents a perfect opportunity for this Court to decide whether district courts have the power to order restitution outside the time limits set by Congress in Section 3664(d)(5).

The district court's restitution order "was undoubtedly late, coming after the deadline prescribed by the Mandatory Victims Restitution Act." Pet. App. 5a. The issue was properly presented to both the district court and the court of appeals, and each wrote a lengthy opinion directly deciding the question presented.

Moreover, the conflict was outcome determinative in this case. The Seventh and Eleventh Circuits have each reversed restitution orders in cases in the same posture as petitioner's, stating that when a district

court fails to issue an order fixing the amount of restitution within Section 3664(d)(5)'s limitation period, it loses the power to order restitution later.

In addition, under the undisputed facts of this case, petitioner would also have prevailed under the Third Circuit's rule. The courts below recognized that petitioner was "not at all to blame for the missed deadline." Pet. App. 17a; see Pet. App. 44a (recognizing that this was not a "tolling situation"). The Third Circuit was clear: Section 3664(d)(5) imposes a 90-day limit on the district court's power to order restitution and while that limit can be tolled, "[i]f the defendant played no significant part in causing the delay, . . . equitable tolling will not be available." *Terlingo*, 327 F.3d at 222.

II. District Courts Lack The Power To Order Restitution Outside Of The Time Limits Set By Section 3664(d)(5).

The "power to fix the sentence for a federal crime" lies in the hands of Congress. *Mistretta v. United States*, 488 U.S. 361, 364 (1989). Thus, there is consensus among the courts of appeals that "[f]ederal courts do not have inherent power to order restitution. The power to order restitution must therefore stem from some statutory source." *United States v. DeSalvo*, 41 F.3d 505, 511 (9th Cir. 1994) (citation omitted); *accord United States v. Hensley*, 91 F.3d 274, 276 (1st Cir. 1996); *United States v. Reifler*, 446 F.3d 65, 120 (2d Cir. 2006); *Farr*, 429 F.3d at 623; *Balentine*, 569 F.3d at 802.

The statutory source for restitution in petitioner's case was the combination of Sections 3663A and

3664. The Seventh and Eleventh Circuits were correct to hold that the plain language of Section 3664(d)(5) authorizes district courts to impose restitution orders only within a specific time frame. Section 3663A, the statutory provision authorizing restitution for specific categories of crimes, expressly provides that "[a]n order of restitution under this section shall be issued and enforced in accordance with section 3664." 18 U.S.C. § 3663A(d). Section 3664(d)(5) in turn provides that if the district court cannot ascertain the amount of restitution in time to order restitution at sentencing, "the court shall set a date for the final determination of the victim's losses, *not to exceed 90 days after sentencing*." *Id.* § 3664(d)(5) (emphasis added). When district courts are uncertain about the amount of restitution to order, they have two options: they can delay sentencing until the victim's losses have been ascertained, in which case the 90-day period does not begin to run, or they can delay ordering restitution for ninety days to enable additional information to be obtained. In addition, under circumstances where the defendant's bad faith acts or omissions are responsible for the court's inability to fix the amount of restitution within the statutory window, the court can toll the 90-day period. And Section 3664(d)(5) itself provides for amending restitution orders under certain clearly defined circumstances. What district courts *cannot* do is arrogate to themselves the right to flout the statutory deadline and nonetheless impose a restitution order. *See Maung*, 267 F.3d at 1121.

The additional proviso in Section 3664(d)(5) regarding after-acquired knowledge of victims' losses reinforces the conclusion that Section 3664(d)(5) means what it says. That proviso states:

> If the victim subsequently discovers further losses, the victim shall have 60 days after discovery of those losses in which to petition the court for an amended restitution order. Such order may be granted only upon a showing of good cause for the failure to include such losses in the initial claim for restitutionary relief.

This directive would make no sense unless the 90-day period in fact imposed a deadline. If district courts retained the right to issue, or to revise, restitution orders "anytime—days, months, years, or decades—after the 90-day deadline," Pet. App. 10a, it would be unnecessary to have a specific, and sharply circumscribed, power to amend restitution orders for late-discovered injuries. *See Flores-Figueroa v. United States*, 129 S. Ct. 1886, 1892 (2009) (courts "should not interpret a statute in a manner that makes some of its language superfluous").

The Tenth Circuit's decision to the contrary rests on three critical errors. The first was its purported plain language analysis. The Tenth Circuit essentially disregarded the language of Section 3664(d)(5) itself. Instead, it focused on the language of Section 3663A, the provision authorizing the imposition of restitution as part of a criminal sentence. In the Tenth Circuit's view, the language at the very beginning of Section 3663A(a)(1) –

providing that "[n]otwithstanding any other provision of law," a district court "when sentencing a defendant convicted of [a covered] offense . . . shall order" restitution – somehow trumped Section 3664(d)(5)'s time limits. That is simply incorrect. Subsection (a)(1) of Section 3663A cannot sensibly be read to trump subsection (d) of the *very same statute* – the subsection that directs courts to "issu[e] and enforc[e]" their restitution orders "in accordance with section 3664." To the contrary, Section 3664 actually constrains the operation of Section 3663A, by, for example, placing the "burden of demonstrating the amount of the loss sustained by a victim as a result of the offense . . . on the attorney for the Government." *Id.* § 3664(e). Thus, for example, it seems obvious that if the court is in equipoise as to whether the victim suffered a particular loss, it must refrain from ordering restitution. The Tenth Circuit never explains why Congress would have gone to the bother of writing explicit limitations, including time limits, into the statute if it had already declared in the opening line of subsection 3663A(a)(1) that none of what followed had to be obeyed.

Moreover, the Tenth Circuit's reading would lead to absurd results. Under its reasoning, a district court would be required to order restitution for losses "not included in the initial claim for restitutionary relief" without regard to whether the victim complied with the 60-day limit or whether there was "good cause" for the victim's failure. *Id.* § 3664(d)(5). After all, if the "notwithstanding" language trumps the 90-day deadline for initial restitution orders, there is no

principled reason for following the "good cause" and 60-day limits for amended orders either.

The second flaw in the Tenth Circuit's reasoning lies in its assumption that if Section 3664(d)(5) was not "jurisdictional" in the strongest sense of the word – because, for example, it gives courts the power to reopen their orders after the 90-day period has run for good cause – then untimely restitution orders are permissible. This Court has cautioned that "[j]urisdiction is a word of many, too many, meanings." *Steel Co. v. Citizens for Better Environment*, 523 U.S. 83, 90 (1998) (internal quotation marks omitted). To be sure, Section 3664(d)(5) is not "jurisdictional" in the sense that it "delineat[es] the classes of cases (subject-matter jurisdiction) [or] the persons (personal jurisdiction) falling within a court's adjudicatory authority." *Kontrick v. Ryan*, 540 U.S. 443, 455 (2004). But a rule need not be "jurisdictional" in this sense to constitute "an inflexible claim-processing rule." *Id.* at 456; *see Eberhart v. United States*, 546 U.S. 12, 19 (2005) (reiterating the status of Fed. R. Crim. P. 45(b) as an "inflexible . . . demand for a definite end to proceedings" despite its being "nonjurisdictional"[8]).

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[8] Fed. R. Crim P. 45(b)(1)(B) provides that, in general "[w]hen an act must or may be done within a specified period, the court on its own may extend the time . . . after the time expires if the party failed to act because of excusable neglect." But Fed. R. Crim P. 45(b)(2) states that "[t]he court may not extend the time to take any action under Rule 35" – the rule for correcting sentences – "except as stated in that rule." Courts of appeals have frequently held that Rule 45(b)(2) prohibits

Like other statutory deadlines, the time limit in Section 3664(d)(5) precludes courts from issuing untimely orders. The fact that statutes of limitations, for example, are subject to tolling and waiver and must be raised as an affirmative defense does not mean that a court has the power to adjudicate an untimely claim after a defendant has properly objected, as petitioner did here. *See Eberhart*, 546 U.S. at 17 (pointing out that district courts must observe "clear [time] limits" in criminal proceedings when those limits are "properly invoked").[9]

The third flaw in the Tenth Circuit's analysis was that it imported principles excusing official delay in civil cases into the context of criminal sentencing. None of the cases it cited for the proposition that time limits can be ignored in the service of overarching statutory purposes involved criminal punishment. The closest the Tenth Circuit came was its reliance on *United States v. Montalvo-Murillo*, 495 U.S. 711 (1990), a case under the Bail Reform Act, whose pretrial detention provisions this Court has unequivocally described as regulatory rather than

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district courts from increasing an erroneous sentence after the seven-day window provided in Rule 35(a). *See, e.g.*., *United States v. Austin*, 217 F.3d 595, 597 (8th Cir. 2000).

[9] Nor, of course, when a statute of limitations has been properly invoked by a defendant does a court require a defendant to show prejudice. The purpose of having statutes of limitations, rather than relying on equitable concepts such as laches, is to avoid requiring a case-by-case inquiry into the effects of delay.

punitive. *United States v. Salerno*, 481 U.S. 739, 747 (1987). Criminal prosecutions are different. If the government delays in charging a defendant until the statute of limitations has run, for example, a court cannot revive the prosecution because it would be in the public interest to convict the defendant or in the crime victim's interest to obtain restitution. Similarly, the government's obligation to bring a defendant to trial within the time limits set by the Speedy Trial Act cannot be treated simply "as a spur to prompt action, [and] not as a bar to the tardy completion of the business" Congress mandated. Pet. App. 12a (quoting *Barnhart v. Peabody Coal*, 537 U.S. 149, 172 (2003)). While no equivalent presumption governs civil cases, the "rule of lenity" requires that "ambiguous criminal statutes . . . be construed in favor of the accused." *Staples v. United States*, 511 U.S. 600, 619 n.17 (1994). Thus, the Tenth Circuit's reliance on *Montalvo-Murillo*, which took the Bail Reform Act's "silen[ce] on the issue of a remedy for violations of its time limits," 495 U.S. at 716, as justification for striking the balance in favor of the government, is misplaced.

In light of a proper construction of the plain language of Section 3664(d)(5), there is "no reason to resort to legislative history." *United States v. Gonzales*, 520 U.S. 1, 6 (1997); *see Maung*, 167 F.3d at 1121-22; *Farr*, 419 F.3d at 625. But even if one were to do so, beyond a few isolated restatements of the general principle that a restitution statute is intended to provide redress to victims, there is little to support the Tenth Circuit's position. In fact, given the various incentives busy federal courts face, it is

entirely possible that the Tenth Circuit's approach, by removing any adverse consequences from a court's failure to comply with the 90-day deadline, will actually *delay* the prompt entry of restitution orders and work to the detriment of victims. If it doesn't matter when a restitution hearing is held and an order is entered, resolution of restitution claims may end up being postponed while district courts turn to other issues that seem more pressing.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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September 23, 2009

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

BRIAN RUSSELL DOLAN,

Defendant-Appellant.

No. 08-2104

FILED
United States Court of Appeals
Tenth Circuit
June 26, 2009
Elisabeth A. Shumaker
Clerk of Court

ORDER

Before MURPHY, ANDERSON, and GORSUCH, Circuit Judges.

Appellant's petition for rehearing is granted *sua sponte* for the limited purpose of adding the following footnote to the end of section II, page 19:

> Mr. Dolan argues that our holding conflicts with *United States v. Bedonie*, 413 F.3d 1126

> (10th Cir. 2005). It does no such thing. In *Bedonie*, we considered whether § 3664(d)(5) authorized the district court to reopen an already entered restitution order *sua sponte* simply because it had reconsidered the wisdom of its order. We concluded that the MVRA grants the district court no such authority. At the same time, we took pains to emphasize in *Bedonie* that our decision did *not* limit the authority of a district court "'hold[] open' . . . a restitution issue at the original sentencing" pending receipt of facts needed to enter an initial restitution order. *Id.* at 1129. This, or course, is precisely the case we now face: whether and to what degree a "holding open" of the restitution question past the original sentencing hearing and the statutory deadline is permissible—not whether and to what degree a district court's *sua sponte reopening* of an existing restitution order is statutorily authorized.

A copy of the corrected opinion is attached, filed nunc pro tunc to May 27, 2007.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel

and no judge in regular active service on the court requested that the court be polled, that petition is denied.

Entered for the Court

/S/

ELISABETH A. SHUMAKER, Clerk

PUBLISH

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. BRIAN RUSSELL DOLAN, Defendant-Appellant.	No. 08-2104

Appeal from the United States District Court
For the District of New Mexico
(D.C. No. 06-CR-2173-RB)

[AMENDED OPINION]

Before MURPHY, ANDERSON, and GORSUCH, Circuit Judges.

GORSUCH, Circuit Judge.

Brian Dolan viciously attacked a hitchhiker, leaving his victim by the side of the road bleeding, unconscious, with a great many broken bones. Eventually, officers found the hitchhiker and rushed him to a hospital. He survived, but his medical expenses topped $100,000. When it came time to sentence Mr. Dolan for his assault, the district court ordered him not only to serve 21 months in prison but to pay $250 monthly in restitution. Before us, Mr. Dolan doesn't challenge his prison sentence but does say his victim should get nothing. He contends that the district court's restitution order is void because it was entered too late, after a statutory deadline passed. Even if the district court had the power to enter an untimely restitution award, Mr. Dolan argues, $250 per month is more than he can afford.

We reject both arguments. The district court's restitution order was undoubtedly late, coming after the deadline prescribed by the Mandatory Victims Restitution Act. But a tardy restitution order is not an invalid one. Rather than creating a jurisdictional bar to untimely restitution orders, the MVRA' s deadline seeks to prod the government into ensuring victims swift compensation. Sometimes, of course, the government is not so easily prodded. When that happens—when the MVRA's deadline passes without a restitution order entered—the affected victim may well have cause to complain, and may even seek a mandamus order compelling action. But the defendant does not get off the hook. Neither can we say that the district court abused its discretion in pegging Mr.

Dolan's monthly restitution payments at $250, given the record before us.

I

One evening, Mr. Dolan picked up an acquaintance and fellow tribe member who was hitchhiking on a road inside the Mescalero Indian Reservation. At some point, the pair began to argue. The argument grew heated, and eventually Mr. Dolan parked his car so the men could fight. The encounter proved a brutal one for the hitchhiker. He later reported that he suffered a fractured nose, a broken wrist, a fractured leg, a spinal injury, broken ribs, and a hematoma in his head. Mr. Dolan left the hitchhiker lying on the side of the road and drove off. Once home, he told his sister, Deanna Dolan, of the assault. In turn, Ms. Dolan alerted the Bureau of Indian Affairs ("BIA") police. A responding BIA officer eventually found the hitchhiker unconscious and bleeding on the roadside. The hitchhiker was treated briefly at the scene and then helicoptered to a hospital in EI Paso, Texas.

For his part, Mr. Dolan was apprehended and pled guilty to assault resulting in serious bodily injury, in violation of 18 U.S.C. §§ 1153 and 113(a)(6). On July 30, 2007, the district court sentenced Mr. Dolan to 21 months' imprisonment. At the sentencing hearing, the court also noted that restitution was required by the MVRA. But, because it did not yet have sufficient information as to the amount of restitution owed, the court "le[ft] that matter open, pending receipt of additional information." The court then informed Mr. Dolan that he should "anticipate that such an award

will be made in the future." The district court's judgment, entered on August 8, 2007, indicated that restitution was applicable but that the court did not yet have sufficient information to set an appropriate amount.

On October 5, 2007, the probation office reported that it now had enough information to calculate a restitution award. The office estimated the victim's medical care cost at $105,559.78. It provided the court with documentation for this figure and recommended that the court order Mr. Dolan to pay that amount in restitution. The probation office also indicated that, "[p]ursuant to [18 U.S.C. §] 3664(d)(5)" of the MVRA, "the Court shall set a date for the final determination of the victim's losses, not to exceed 90 days after sentencing, which in this case shall be October 28, 2007."[1]

It is here things get tricky. The district court did not hold a hearing for a final determination on restitution by October 28, 2007, as required by §

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[1] 18 U.S.C. § 3664(d)(5) provides: "If the victim's losses are not ascertainable by the date that is 10 days prior to sentencing, the attorney for the Government or the probation officer shall so inform the court, and the court shall set a date for the final determination of the victim's losses, not to exceed 90 days after sentencing. If the victim subsequently discovers further losses, the victim shall have 60 days after discovery of those losses in which to petition the court for an amended restitution order. Such order may be granted only upon a showing of good cause for the failure to include such losses in the initial claim for restitutionary relief."

3664(d)(5), but instead waited until February 4, 2008. At the February hearing, Mr. Dolan's counsel argued that the court no longer had authority to order restitution because more than 90 days had passed since the entry of Mr. Dolan's sentence. The court ordered briefing on that question, as well as on Mr. Dolan's ability to pay. A hearing followed and, in due course, the district court issued a memorandum opinion and order. In its order, the court candidly acknowledged that it had erred "in not complying with the 90-day requirement," but held that § 3664(d)(5) did not deprive it of jurisdiction to enter a restitution award after the 90-day deadline.

The district court then considered how much restitution Mr. Dolan should pay. The court noted that Mr. Dolan held essentially no assets, had substance abuse problems, and, at the time of the offense, was unemployed. But the court also observed that Mr. Dolan receives an annual tribal stipend of $575 and obtained a GED while incarcerated, thus enhancing his employment potential on release (which has since occurred). Based on Mr. Dolan's "lack of financial resources, income, assets, and potential for future earnings," the district court found that he would be unable to pay "any significant amount of restitution now or in the foreseeable future." Still, the court believed that Mr. Dolan could afford monthly payments of $250, and ordered him to do so.

Mr. Dolan now appeals to us on two grounds. First, he argues that, because the district court acted outside § 3664(d)(5)'s 90-day deadline, its restitution order is void. Second, he contends that the payment schedule

fails to take adequate consideration of his ability to pay. We address each contention in turn.

II

Mr. Dolan argues that the 90-day deadline set by § 3664(d)(5) is jurisdictional. Put differently, he thinks the district court's power to enter *any* restitution order expired 90 days after his sentencing on July 30, 2007. Because the district court failed to carry out its mandatory duty by the deadline, his victim (and the victim's third party insurer) should get nothing. We review *de novo* Mr. Dolan's appeal about the meaning of § 3664(d)(5), but even so we cannot agree with his interpretation of the statute. The plain language of the Act, longstanding canons of construction, the MVRA's legislative history, and our own case law all plot against his interpretation.

First, the language of the Act itself. As its name suggests, the Mandatory Victims Restitution Act is all about *mandating* restitution. No longer is the decision whether to order restitution for certain crimes left to the discretion of the district court. *See United States* v. *Taylor,* 41 Fed. Appx. 380, 383 (10th Cir. 2002). The absolute nature of the district court's obligation is unmistakable from the very first paragraph of the Act. There, Congress has prescribed that "*[n]otwithstanding any other provision of law,* when sentencing a defendant convicted of [an offense covered by the Act], the court *shall* order ...restitution." 18 U.S.C. § 3663A(a)(1) (emphasis added). Plainly, Congress has decided that defendants

who have committed certain offenses should *never* be able to avoid restitution.

As Mr. Dolan emphasizes, later in the Act, in § 3664(d)(5), Congress added that restitution "shall" be awarded within 90 days after sentencing. But this deadline, while real, is no doubt encompassed within § 3663A(a)(1)'s phrase "any other provision of law." So, while the 90-day deadline is surely a command of the Act, it can be reasonably understood only as a subsidiary command to the Act's primary and overriding directive that restitution *must* be ordered for certain crimes. Read together, the statute thus suggests that restitution shall be awarded within 90 days but also that, notwithstanding any missed deadline, restitution must be awarded. As the Supreme Court has explained when faced with an analogous statutory rubric, "the use of such a 'notwithstanding' clause clearly signals the drafter's intention that the provisions of the 'notwithstanding' section override conflicting provisions of any other section." *Cisneros* v. *Alpine Ridge Group,* 508 U.S. 10,18 (1993); *see also Liberty Maritime Corp.* v. *United States,* 928 F.2d 413, 416 (D.C. Cir. 1991) (explaining that notwithstanding clauses "supersede all other laws" because "[a] clearer statement is difficult to imagine") (brackets in original).

Confirming Congress's point, § 3664(d)(5) itself authorizes the district court to revise a restitution order anytime—days, months, years, or decades—after the 90-day deadline, should the victim discover additional losses caused by the defendant's conduct. Even viewing § 3664(d)(5) in isolation, then, it is

evident that Congress did not intend to divest the district court of all power over restitution awards after 90 days. *See United States* v. *Moreland,* 509 F.3d 1201, 1224 (9th Cir. 2007), *vacated on other grounds by* 129 S. Ct. 997 (2009); *United States* v. *Cheal,* 389 F.3d 35, 48-50 (lst Cir. 2004); *United States* v. *Vandeberg,* 201 F.3d 805, 814 (6th Cir. 2000). *Cf.* 18 U.S.C. § 3664(k) (authorizing district courts to revise payment schedules).

Any possible lingering ambiguity on this point is dispelled by § 3664's title. *See Carter* v. *United States,* 530 U.S. 255,267 (2000) (resort to statutory titles is permissible to address statutory ambiguities). As our sister circuits have observed, the subsection's title practically "advertises" the 90-day time limit's non-jurisdictional nature by declaring that it concerns the "*Procedure* for issuance and enforcement of order of restitution." 18 U.S.C. § 3664 (emphasis added); *Moreland,* 509 F.3d at 1224; *Cheal,* 389 F.3d at 48-49. Procedures for processing claims and arguments are of course important, and respect for them may be mandatory in certain circumstances when timely invoked, but they do not strip a court of subject matter jurisdiction to entertain a dispute. *See, e.g., Bowles* v. *Russell,* 551 U.S. 205, 127 S.Ct. 2360 (2007); *Kontrick* v. *Ryan,* 540 U.S. 443 (2004). Congress is surely well aware of this distinction between claims processing procedures and federal court subject matter jurisdiction, and it knows how to restrict the latter when it wishes to do so. The fact that Congress conceived of § 3664 as a claims processing procedure is evidence that it had no intent to do so here.

Second, Mr. Dolan's interpretation runs afoul not just of the statute's language and structure, but also an essential canon of statutory construction. The Supreme Court has cautioned us against "readily infer[ring] congressional intent to limit an agency's power to get a mandatory job done merely from a specification to act by a certain time." *Barnhart* v. *Peabody Coal,* 537 U.S. 149, 160 (2003). Where, as here, a statute seeks to "direct[] official action" by a particular deadline, the Court has directed us that a statute "needs more than a mandatory 'shall' before the grant of power can sensibly be read to expire when the job is supposed to be done." *Id.* at 161. Absent some specifically identified consequence for failing to comply with the deadline, we are obliged to read such a statute "as a spur to prompt action, not as a bar to the tardy completion of the business" Congress mandated. *Id.* at 172; *see also Regions Hosp.* v. *Shalala, 522* U.S. 448, 459 n.3 (1998) (explaining that a Cabinet Secretary's failure to meet statutory deadline did "not mean that official lacked power to act beyond it"); *United States* v. *James Daniel Good Real Prop.,* 510 U.S. 43, 63-64 (1993) (unless a statute "specif[ies] a consequence for noncompliance with statutory timing provisions," generally we may not "impose [our] own coercive sanction"); *United States* v. *Montalvo-Murillo,* 495 U.S. 711, 721 (1990) ("We do not agree that we should, or can, invent a remedy to satisfy some perceived need to coerce the courts and the Government into complying with the statutory time limits."); *Brock* v. *Pierce County,* 476 U.S. 253, 265 (1986) (statute providing that Secretary of Labor "shall" take action within 120 days did not divest the

Secretary of authority to act beyond deadline); 3 Norman J. Singer & J.D. Shambie Singer, Sutherland on Statutes and Statutory Construction § 57: 19 (6th ed.) ("The general rule is that if a provision of a statute states a time for performance of an official duty, *without any language denying performance after a specified time,* it is directory [rather than jurisdictional].") (emphasis added).

Call this the better-late-than-never principle. Congress imposes deadlines on other branches of government to prod them into ensuring the timely completion of their statutory obligations to the public, not to allow those branches the chance to avoid their obligations just by dragging their feet. It would be a strange thing indeed if a bureaucracy or court could avoid a congressional mandate by unlawful delay. As the Supreme Court has explained, its canon of construction recognizes the "great principle of public policy, applicable to all governments alike, which forbids that the public interests should be prejudiced by the negligence of the officers or agents to whose care they are confided." *Brock,* 476 U.S. at 260 (quoting *United States* v. *Nashville,* C. & *St. L.R. Co.,* 118 U.S. 120,125 (1886)).

Here, of course, § 3664(d)(5) requires restitution to be ordered within 90 days, and it has no other language purporting to deny district courts the authority to enter late restitution orders. The canon against a jurisdictional reading thus applies with full force. In this respect, our case is very much like the one we and the Supreme Court faced in *Montalvo-Murillo. See United States* v. *Montalvo-Murillo,* 876

F.2d 826 (10th Cir. 1989), *rev'd by* 495 U.S. 711 (1990). The statute at issue there was the Bail Reform Act of 1984, which required district courts to hold a hearing at an arrestee's first appearance to consider whether or not the arrestee should be detained pending trial. *Montalvo-Murillo,* 495 U.S. at 714. As it happened, however, the magistrate judge assigned to the case failed to make this assessment at the arrestee's first appearance. *Id.* at 715. Reading the statute as imposing a jurisdictional deadline, the district court held that, as a result of the magistrate judge's oversight, it lacked authority to detain the defendant and was bound to release him. *Id.* at 716. This court concurred with the district court's analysis, *Montalvo-Murillo,* 876 F.2d at 827, but the Supreme Court reversed, explaining that it found "nothing in the statute to justify" an interpretation that the courts have no power to detain "once the statutory time for hearing has passed." *Montalvo-Murillo,* 495 U.S. at 721. To the contrary, the Court held, such an interpretation impermissibly "expos[ed] the public to an increased likelihood of violent crime by persons on bail, an evil the statute aims to prevent." *Id.* at 720. Exactly the same might be said here: Nothing in the MVRA suggests that a defendant should be freed from the obligation of paying restitution just because the district court was slow in ordering it; such a result would thwart rather than effect Congress's express desire that all victims of covered crimes receive restitution.

Of course, mandatory ("shall") deadlines abound in other contexts and are often interpreted as

jurisdictional. So, for example, the Supreme Court recently found jurisdictional a statutory deadline prescribing the time period in which a notice of appeal must be filed. *Bowles,* 551 U.S. __, 127 S. Ct. at 2362. How, then, can we explain the difference between our case and those like *Bowles?* While no doubt there are other points of distinction, most critical for our purposes is this one: The statute at issue in *Bowles* affords all parties a discretionary opportunity to appeal if they meet a deadline, while the statutes at issue in *Montalvo-Murrilo, Barnhart,* and our case impose mandatory obligations on government officials to perform duties on behalf of the public. The former statute pertains to all parties; the others only to governmental actions designed to advance a congressionally identified public interest. The former affords a discretionary opportunity; the other concerns a mandatory obligation. In this latter respect, *Bowles* is something like the father who tells his daughter, "to receive ice cream, you shall eat all your dinner by 7 o'clock." Meanwhile, *Montalvo-Murillo, Barnhart,* and our case are more like the father who tells his daughter "you shall eat everything on your plate and you shall do it by 7 o'clock." In the first example, the child won't receive ice cream if dinner remains on the plate after 7, but the choice is the child's. In the second example, dinner had better be eaten by the deadline, but even if it is not, no one would expect the child to be free to skip off to bed without clearing her plate. So it is with the MVRA—district courts *must* order restitution by the deadline, but even if they are late they cannot avoid the restitution obligation.

Third, while the Supreme Court has acknowledged that legislative history can sometimes prove "[a] murky, ambiguous, and contradictory" business, *Exxon Mobil Corp.* v. *Allapattah Servs. Inc.,* 545 U.S. 546, 568 (2005), it has sometimes studied that history for guidance in analogous cases, *see, e.g., Barnhart,* 537 U.S. at 165-66 (2003); *Montalvo-Murillo,* 495 U.S. at 720; *Brock,* 476 U.S. at 263-65. Doing so may not be strictly necessary in this case in light of all we have said already, but any such examination only reinforces our conclusion.

Mr. Dolan submits that the Senate Committee Report aids his cause when it discusses "the need for finality and certainty in the sentencing process" and indicates that this need "dictates that th[e] determination [of restitution] be made quickly." S. Rep. 104-179, at 20 (1995). But Mr. Dolan misses the point of this discussion. The Committee Report makes plain that its emphasis on the need for speed and finality arises out of concern for victims, not victimizers. The Report proceeds to explain that the "*sole* due process interest of the defendant being protected during the sentencing phase" isn't the right to a speedy determination, but only "the right not to be sentenced on the basis of invalid premises or inaccurate information." *Id.* (emphasis added). By contrast, when it comes to victims, the Report stresses that "justice cannot be considered served until full restitution is made." *Id.* In the Committee's words, "[i]t is essential that the criminal justice system recognize the impact that crime has on the victim, and, to the extent possible, ensure that [the] offender be held

accountable to repay these costs." *Id.* at 18. As we have explained previously, any complete examination of the Report or the entirety of the Act's legislative history can fairly lead only to the conclusion that "Congress intended the 90 day limitation period to protect victims against the dissipation of defendants' assets and not to protect defendants from a drawn-out sentencing process or to establish finality." *United States* v. *Dando,* 287 F.3d 1007, 1010 n.4 (10th Cir. 2002).

Finally, our holding today is in full harmony with our prior decisions in *Dando* and *United States* v. *Reano,* 298 F.3d 1208 (10th Cir. 2002). In both cases, we upheld the authority of a district court to enter a restitution order after § 3664(d)(5)'s 90-day deadline—results that strongly suggest the deadline's non-jurisdictional nature.

Mr. Dolan seeks to avoid this conclusion by stressing that we allowed late-entered restitution orders in *Dando* and *Reano* only because the defendants in those cases were at least partially responsible for the delay. Here, by contrast, Mr. Dolan notes, he is not at all to blame for the missed deadline. On this basis, Mr. Dolan submits, neither *Dando* or *Reano* can control our decision.

To some extent, Mr. Dolan is surely right. Neither *Dando* nor *Reano* had occasion to address the question before us today and neither, strictly speaking, controls our disposition. In *Dando,* we held the 90-day deadline "tolled" by virtue of the defendant's request for a continuance and evidentiary hearing. 287 F.3d at

1011. In *Reano,* we held that the 90-day period was "tolled" by the defendant's appeal of a restitution award. 298 F.3d at 1211-12. But even spotting all this to Mr. Dolan, the fact remains that in neither *Dando* nor *Reano* did we hold that a failure to order restitution before the 90-day deadline deprived the district court of jurisdiction to act. In both cases, we allowed late-entered restitution orders. And there is nothing in the language, structure, or history of the statute to suggest that the MVRA imposes a jurisdictional limit on the district court's authority to award restitution when the government or district court is at fault for the delay but not when the defendant is to blame.

Put differently, while neither *Dando* or *Reano* addressed the question now before us—what to do about delay caused by the government or district court, rather than by the defendant—neither case is in any way inconsistent with our holding today that § 3664(d)(5)'s deadline is non-jurisdictional. And it is surely notable that our decision today is consistent not only with our prior precedent but with the decisions of the First, Second, Fourth, and Ninth Circuits, each of which has held, as we do, that the passing of § 3664(d)(5)'s deadline does not toll the death knell of the district court's subject matter jurisdiction. *See United States* v. *Douglas,* 525 F.3d 225, 252-53 (2d Cir. 2008); *Moreland,* 509 F.3d at 1224; *United States*

v. *Johnson,* 400 F.3d 187, 198-99 (4th Cir. 2005); *Cheal,* 389 F.3d at 48-50.[2]

Having concluded that the MVRA' s deadline seeks to spur prompt restitution orders, not spurn belated ones, the question naturally arises whether *any* remedy exists for a district court's failure to comply with the 90-day deadline. The MVRA is of course silent on this score, and we have read the 90-day deadline as non-jurisdictional in part precisely because of that silence. In these circumstances, the Supreme Court has sometimes indicated that "[w]e do not agree that we should, or can, invent a remedy to satisfy some perceived need to coerce the courts and the Government into complying with the statutory time limits. Magistrates and district judges can be

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[2] The Sixth Circuit appears to have decisions on both sides of the question. *Compare Vandeberg,* 201 F.3d at 814 with *United States [v.] Jolivette,* 257 F.3d 581, 584 (6th Cir. 2001). The Seventh Circuit also arguably appears to have competing trends in its jurisprudence. *Compare United States* v. *Farr,* 419 F.3d 621, 625 (7th Cir. 2005) (invalidating restitution order entered more than 90 days after sentencing) *with United States* v. *Grimes,* 173 F.3d 634, 639 (7th Cir. 1999) (defendant not prejudiced by district court's failure to identify within 90 days of sentence all the crime victims entitled to restitution). *See also United States* v. *Maung,* 267 F.3d 1113, 1122 (11th Cir. 2001) (invalidating restitution order entered more than 90 days after sentencing but reserving question whether restitution could be validly entered after the deadline if the delay was caused by the "defendant's bad faith delay"); *United States* v. *Stevens,* 211 F.3d 1, 5 (2d Cir. 2000) (holding that 90-day deadline may be tolled by defendant's purposeful misconduct).

presumed to insist upon compliance with the law[.]" *Montalvo-Murillo,* 495 U.S. at 721. Arguably, as well, there is no need for courts to "invent" a remedy given the existence of the All Writs Act. Should a district court fail to comply with the 90-day deadline, it would be hardly surprising if a victim sought and obtained a writ of mandamus to compel the district court to enter a restitution order forthwith. *See In re Antrobus,* 519 F.3d 1123, 1124 (10th Cir. 2008) (noting that one of the traditional offices of the writ has been to compel an inferior court "to exercise its authority when it is its duty to do so") (quoting *Allied Chern. Corp.* v. *Daiflon, Inc.,* 449 U.S. 33, 34 (1980) (per curiam)).

While saying all this, we also must acknowledge that some of our sister circuits have held out the possibility that, if a defendant could establish prejudice arising from the district court's failure to enter restitution within the 90-day deadline, they might well craft some remedy to address any such prejudice. *See Moreland,* 509 F.3d at 1224-25; *Johnson,* 400 F.3d at 199; *see also Montalvo-Murillo,* 495 U.S. at 721-22 (emphasizing that defendant was not prejudiced by court's failure to hold hearing in conformity with Bail Reform Act's timing requirements). For reasons we have already articulated, we are unsure whether Congress has authorized us to excuse a defendant from the obligation to pay restitution for offenses covered by the MVRA under any circumstances. Neither is it altogether obvious how a defendant might be prejudiced by an untimely restitution order: it would seem "*afortiori* more than highly probable" that a

delayed restitution order would "not adversely affect [the defendant's] substantial rights." *United States* v. *Stevens,* 211 F.3d 1, 6 (2d Cir. 2000). After all, it is usually better to pay a dollar tomorrow than to pay one today. Happily, however, we can leave the final resolution of all this for another case because, in the one actually before us, Mr. Dolan does not purport to identify any way in which his substantial rights were infringed by the district court's decision requiring him to pay restitution later rather than sooner.

While we today decide the 90-day deadline is not a jurisdictional limit on the district court's authority to order restitution, our holding should *not* be misconstrued as suggesting the government has the discretion to seek, and the district court has discretion to enter, restitution on any time schedule they find convenient. The law remains that the district court *shall* enter a restitution order within 90 days. And this directive serves important congressionally identified purposes—to ensure victims timely compensation and to prevent the potential dissipation of defendants' assets. District courts and the government must take steps to ensure compliance with the MVRA' s deadline and the public interests it serves, just as they must with any other congressional command. Though district courts do not lose the authority to enter restitution after 90 days, the law remains the law and courts and the government alike are bound to follow it. As the Supreme Court explained in *Montalvo-Murillo,* though "the sanction for breach is not loss of all later powers to act," the duty remains a "mandatory" one. 495 U.S. at 718. Failure to abide Congress's

instruction still "represent[s] a default on a statutory duty." *Barnhart,* 537 U.S. at 157.[3]

III

Having said that the district court retained authority to enter a restitution award despite its failure to comply with the 90-day deadline, we must still ask whether the amount the district court ordered Mr. Dolan to pay each month, $250, adequately accounts for his financial condition.

While the MVRA requires that the total amount of restitution be ordered "without consideration of the economic circumstances of the defendant," 18 U.S.C. § 3664(f)(1)(A), the district court can and must consider the defendant's economic circumstances in fashioning a restitution *payment schedule, id.* at § 3664(f)(2).

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[3] Mr. Dolan argues that our holding conflicts with *United States v. Bedonie*, 413 F.3d 1126 (10th Cir. 2005). It does no such thing. In *Bedonie*, we considered whether § 3664(d)(5 authorized the district court to reopen an already entered restitution order *sua sponte* simply because it had reconsidered the wisdom of its order. We concluded that the MVRA grants the district court no such authority. At the same time, we took pains to emphasize in *Bedonie* that our decision did *not* limit the authority of a district court "'hold[] open' . . . a restitution issue at the original sentencing" pending receipt of facts needed to enter an initial restitution order. *Id.* at 1129. This, or course, is precisely the case we now face: whether and to what degree a "holding open" of the restitution question past the original sentencing hearing and the statutory deadline is permissible—not whether and to what degree a district court's *sua sponte reopening* of an existing restitution order is statutorily authorized.

Specifically, the district court must consider "(A) the financial resources and other assets of the defendant, including whether any of the assets are jointly controlled; (B) projected earnings and other income of the defendant; and (C) any financial obligations of the defendant[,] including obligations to dependents." *Id.* If, after consideration of these factors, the court finds that "the economic circumstances of the defendant do not allow ... for the payment of the full amount of a restitution order in the foreseeable future under any reasonable schedule of payments," the district court can direct the defendant to make "nominal periodic payments." *Id.* at § 3664(f)(3)(B).

Mr. Dolan does not (and cannot) argue that the district court failed to consider his economic circumstances. The district court engaged in a thorough examination of Mr. Dolan's financial resources, his projected earnings, and his financial obligations. Dist. Ct. Op. at 15. Neither does (or could) he argue that the facts found by the district court regarding his economic circumstances were erroneous; before us they are undisputed. Instead, Mr. Dolan argues only that, in light of the facts found by the district court as part of its duty to consider his ability to pay restitution, $250 per month is simply too high.

We have previously explained that a district court enjoys "substantial discretion" in setting monthly payment schedules, *see United States* v. *Wilson,* 416 F .3d 1164, 1170 (10th Cir. 2005), and does not abuse this discretion so long as "the evidence indicates a defendant has some assets or earning potential and thus possibly may be able to pay the amount ordered."

United States v. Rogat, 924 F.2d 983, 985 (10th Cir. 1991).[4] Admittedly, asking whether a defendant possibly may be able to pay the amount ordered is a very narrow inquiry and surely poses the defendant with a daunting hurdle. But the limited nature of our appellate inquiry becomes sensible when considered in light of the MVRA's purpose of ensuring maximum restitution to victims; its requirement that restitution awards take account of the defendant's future earning potential, 18 U.S.C. § 3664(f)(2)(B), an exercise that necessarily involves the district court in "a delicate balancing of diverse, sometimes incomparable factors, some which not only lack certainty but may indeed be based on mere probabilities, expectations, guesswork, even a 'hunch,'" *United States* v. *Ismail,* 219 F.3d 76, 78 (2d Cir. 2000), as well as the fact that no restitution payment schedule is ever fixed immutably in stone. As we have already alluded to, if and whenever there is a "material change in the defendant's economic circumstances," the MVRA authorizes the district

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[4] In *Rogat,* we were asked to determine whether a restitution order entered pursuant to the Victims and Witness Protection Act was more than the defendant was able to pay. Given the strong similarities between that statute and the MVRA, however, it provides appropriate guidance here. *See, e.g., United States* v. *Mahone,* 453 F.3d 68, 74 & n.3 (1st Cir. 2006); *United States* v. *Randle, 324* F.3d 550, 556 n.3 (7th Cir. 2003). In fact, we have previously relied on *Rogat* in evaluating a challenge to a payment schedule imposed under the MVRA, albeit in an unpublished decision. *See Taylor,* 41 Fed. Appx. at 384.

court to adjust the defendant's payment schedule "as the interests of justice require." 18 U.S.C. § 3664(k). So if a district court's assessment of a defendant's future earning potential doesn't pan out and its payment schedule proves too onerous, the defendant is not stuck, overwhelmed with an obligation he cannot meet and without the means to seek redress. Congress has specifically directed that the doors of the district court should remain open to the defendant, and that the court is free to revise its payment schedule at any time.

Applying our governing standard of review to this case, we are constrained to affirm. We admit many record facts suggest that Mr. Dolan could have difficulty paying the amount of restitution ordered. His income is small, his employment history poor, his substance abuse problem apparent. There is, however, other evidence in the record suggesting that it is not impossible for Mr. Dolan to meet his monthly payment obligation. The record shows that Mr. Dolan has a GED, has been able to win jobs in the past, is physically able to work, and has few financial obligations because he lives with and is supported by his aunt. The record also reveals that he receives a modest annual stipend from his tribe. Based on the evidence before us, we cannot disagree with the district court that Mr. Dolan has the potential to win a job and earn a living that would allow him to meet a monthly obligation of $250; neither can we ignore the fact we and others have upheld similar restitution orders on similar records against similar challenges. *See, e.g., Wilson,* 416 F.3d at 1170 (upholding

restitution order requiring indigent defendant to pay restitution while incarcerated because he did not show that there were insufficient opportunities to work in prison or that he was physically unable to do so); *Rogat,* 924 F.2d at 986 (upholding restitution award against indigent defendants based on their future earnings potential); *Ismail,* 219 F.3d at 78 (same); *United States* v. *Booth,* 309 F.3d 566, 576 (9th Cir. 2002) (upholding $500 per month payment schedule for defendant with "financial difficulties" on the grounds that he had worked in the past and "might reasonably look forward to being able to pay after his term of imprisonment"). Should events as they unfold reveal a material change in Mr. Dolan's circumstances, he and the district court can and will, pursuant to § 3664(k), adjust the payment schedule.

Affirmed.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	
vs.	)	
	)	No. CR 06-2173 RB
BRIAN RUSSELL DOLAN,	)	
Defendant.	)	

MEMORANDUM OPINION
AND RESTITUTION ORDER

THIS MATTER comes before the Court on Defendant Brian Russell Dolan's February 4, 2008 oral objection to restitution, which alleged that the Court lacked jurisdiction. (*See* Feb. 4 Sentencing Hr'g. Tr. [Doc. 49] at 3). The Court ordered both parties to brief the matter.[1] (*See id.* at 4-5). The Court heard oral argument on April 11, 2008. (Apr. 11 Sentencing Hr'g. Tr. [not yet docketed]). Having considered the parties' submissions and oral arguments, and having also

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[1] The Court also ordered the briefing on Defendant's ability to pay restitution. (Feb. 4 Sentencing Hr'g. Tr. At 5).

conducted independent research, the Court CONCLUDES that it RETAINS JURISDICTION under the Mandatory Victims Restitution Act ("MVRA"). 18 U.S.C. §§ 3663A-3664. Accordingly the Court hereby ORDERS Defendant to pay restitution in the amount of $104,649.78 in nominal periodic payments of $250.00 per month. *Id.* at § 3664(f)(3)(B).

I. BACKGROUND

Pursuant to a plea agreement, Defendant Brian Russell Dolan, a member of the Mescalero Apache Tribe, pled guilty to assault resulting in serious bodily injury of another tribal member, Evan Tissnolthtos, on the Mescalero Apache Reservation, contrary to 18 U.S.C. § 113(a)(6). (Plea Agreement [Doc. 32] at 3-4). *See also* 18 U.S.C. § 1153. The Plea Agreement also reflects an understanding that Defendant would pay such "restitution as may be ordered by the Court." (*Id.* at ¶ 4(e)).

According to the May 30, 2007, Presentence Report ("PSR"), Mr. Tissnolthtos suffered severe head and face injuries, as well as a broken wrist, at the hands of Defendant. (PSR at ¶ 6). Mr. Tissnolthtos sustained "a depressed frontal sinus fracture, a nasal fracture, skin lacerations to the face, multiple abrasions to his right hand, . . . a right lower extremity abrasion, a spine injury, and several broken ribs." (PSR at ¶ 28). Apparently, after assaulting Mr. Tissnolthtos, Defendant then left him unconscious and bleeding on the side of the road. (*See* PSR at ¶ 6). A member of the community discovered Mr. Tissnolthtos at approximately 6:00 P.M. (*id.*). Mr. Tissnolthtos'

injuries were so severe that a medical helicopter was required to transport him to a hospital in El Paso, Texas. (*See id.*). Mr. Tissnolthtos was hospitalized for six days and underwent facial surgery and surgery to relieve a hematoma, as well as orthopedic spinal surgery. (PSR at ¶ 28).

Although the PSR noted that mandatory restitution applied, the PSR indicated that the victim had not verified the amount he claimed in lost wages and that the Indian Health Services had not responded to repeated requests for medical expenses borne by the agency for the victim's treatment. (*Id.* at ¶¶ 101-102). Consequently, the PSR stated that "no information has been received regarding possible restitution payments that may be owed." (*Id.* at ¶ 102). The PSR further state, however, that "[u]pon receipt of said information, it will be forwarded to the Court for consideration." (*Id.*). The Court received no further communication from the Government or Probation regarding restitution until the first sentencing hearing on July 30, 2007.[2]

At the July hearing, the Court inquired whether a restitution amount had been established. (*See* July 30

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[2] The Court had originally scheduled sentencing for June 28, 2007, however, the Government requested a continuance that would allow the victim's sister to allocate at the sentencing hearing. (United States' Mot. Continue Sentencing [Doc. 35] at 1-2). The Court granted a continuance on June 29, 2007, and later set the hearing for July 30, 007. (Order [Doc. 36] at 1; Notice Hr'g [Doc. 37]).

Sentencing Hr'g Tr. [Doc. 48] at 10-11). The victim advocate, on staff with the U.S. Attorney's office, replied that the Government was having a difficult time locating the victim, that they were attempting to work through the victim's sister, and that there was an outstanding bill of about $80,000.00 from the hospital. (*Id.* at 11). The victim advocate then asked the Court if it "want[ed] to give 90 more days for restitution?" (*Id.*) The Court then noted that the script provided by Probation anticipated leaving the restitution question open. (*Id.*). Later in the proceeding, the Court noted:

> Pursuant to the Mandatory Restitution Act, restitution is applicable. However, there is insufficient information on the record at this time regarding possible restitution payments that may be owed. Therefore, I'm not going to order restitution at this time, but leave that matter open, pending the receipt of additional information. And Mr. Dolan can anticipate that such an award will be made in the future.

(*Id.* at 17). The Court filed its Judgment later that same day. (Judgment [Doc. 39] at 1). The Judgment did not include an amount of restitution. (*Id.* at 5). Rather, the Judgment stated:

> If this judgment imposes a fine or a restitution obligation, it shall be a condition of probation that the defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervised release in accordance with the Schedule of

> Payments set forth in the Criminal Monetary Penalties sheet of the Judgment.
>
> * * *
>
> Pursuant to the Mandatory Restitution Act, restitution is applicable; however, no information has been received regarding possible restitution payments that may be owed. Therefore, the Court will not order restitution at this time.

(*Id.* at 3, 5).

On October 4, 2007, the probation officer prepared a Second Addendum to the PSR that included detailed restitution information, and on October 5, 2007, her supervisor approved that addendum. (*See* 2nd Addendum to PSR at 1-2). The Second Addendum indicated that $105,559.78[3] was due to the United States Department of Health and Human Services for the victim's medical care and treatment. Although the Second Addendum notes that the Court needed to decide the restitution matter by October 28, 2007 (*see id.* at 1), it is unclear when the Court received the Second Addendum. Moreover, neither party moved the Court to set a hearing date. Instead, on its own accord, the Court set a hearing for February 4, 2008. (Notice of Hr'g [Doc. 43]).

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[3] The parties later appeared to agree that the correct amount is $104,649.78. (*See* Feb. 4 Sentencing Hr'g Tr. at 2).

As mentioned above, Defendant questioned whether the Court retained jurisdiction over the restitution issue at the February hearing because more than 90 days had elapsed since the first sentencing hearing in July 2007. (*See* Feb. 4 Sentencing Hr'g Tr. at 3). On the Government's motion, the Court ordered both parties to brief the matter. (*See id.* at 4-5). Although the Court ordered the parties to submit briefing within ten days of the February hearing and expressly stated that the case should be re-calendared for mid-February (*id.* at 5), the Government requested, and the Court granted, an extension of briefing time. (Mot. Extension Time File Mem. Br. [Doc. 44] at 1-2; Order [Doc. 46] at 1). Briefing concluded on March 5, 2008 (*see* United States' Mem. Br. [Doc. 53] at 5), and the Court set a final hearing for April 11, 2008 (Notice of Hr'g [Doc. 55]). Unbeknownst to the Court, the Bureau of Prisons released Defendant on supervised release on March 20, 2008. The Court discovered this fact during the April hearing.

II. DISCUSSION

A. Jurisdiction

1. Law

Congress implemented the MVRA, 18 U.S.C. §§ 3663A-3664, under the auspices of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). *United States v. Cheal*, 389 F.3d 35, 46 (1st Cir. 2004). The MVRA amended the Victim and Witness Protection Act (VWPA), 18 U.S.C. § 3663, *see United*

States v. Moreland, 509 F.3d 1201, 1222 (9th Cir. 2007), which permitted federal courts to issue discretionary orders of restitution, *United States v. Serawop*, 505 F.3d 1112, 1117 (10th Cir. 2007). The MVRA provides:

> "*notwithstanding any other provision of law,* when sentencing a defendant convicted of [a crime of violence[4]], the court *shall order*, in addition to . . . any other penalty authorized by law, that the defendant make restitution to the victim of the offense . . ."

18 U.S.C. §§ 3663A(a)(1), -(c)(1)(A)(i) (2008) (emphasis added). The order of restitution must include "the cost of necessary medical and related professional services." *Id.* § 3663A(b)(2). "The primary and overarching goal of the MVRA is to make victims of crime whole, to fully compensate . . . victims for the losses and to restore . . . victims to their original state of well-being." *Moreland*, 509 F.3d at 1222 (internal quotations omitted). Furthermore, in Congress' specifically designated AEDPA legislative history, *Cheal*, 389 F.3d at 49 n. 16, the Senate Judiciary Committee recognized that "justice cannot be considered served until full restitution is made," *id.* at 49.

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[4] Assault resulting in serious bodily injury is a crime of violence. *See* 18 U.S.C. § 16(a) (defining crime of violence as "an offense that has an element the use . . . of physical force against the person . . . of another.")

Section 3664, the provision at issue in this case, sets out "the procedures for issuing and enforcing restitution orders." *United States v. Stevens*, 211 F.3d 1, 4 (2nd Cir. 2000). Specifically, if restitution is still unascertainable ten days prior to a scheduled sentencing hearing, the Government attorney and/or the responsible probation officer have a duty to notify the court. *See* 18 U.S.C. § 3664(d)(5) (2008). Such communication reminds the court that it "shall set a date for the final determination[5] of the victim's losses, not to exceed 90 days after sentencing." *Id.* No such communication was received by the Court in this case. The provision also permits victims to petition for further restitution for subsequently discovered losses. *Id.* ("the victim shall have 60 days after discovery of those losses in which to petition the court for an amended restitution order.").

No court has definitively stated that § 3664(d)(5) is a jurisdictional statute. In contrast, the First, Sixth, and Ninth Circuits have each stated that the statute is not jurisdictional. *See Moreland*, 509 F.3d at 1224 (concluding that the defendant's jurisdictional argument failed because such a finding would

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[5] Every court to examine the meaning of "final determination" has concluded that the phrase indicates entry of the restitution order. *E.g., United States v. Dando*, 287 F.3d 1007, 1000 n.5 (10th. Cir. 2002) (agreeing that "the provision that a victim may petition the court for an amended restitution order would have no meaning unless the order had been entered.")

undermine the statute's provision allowing restitution for subsequently discovered losses and stating that the MVRA neither confers nor terminates the court's jurisdiction); *Cheal*, 389 F.3d at 48 (finding that the provision allowing the victim to recover subsequently discovered losses undermined the defendant's jurisdictional argument); *United States v. Vandeberg*, 201 F.3d 805, 814 (6th Cir. 2000) ("Section 3664(d)(5) is not a jurisdictional statute."). *See also United States v. Bogart*, 490 F. Supp.2d 885, 899 (S.D. Ohio 2007) (quoting *Vandeberg*, 205 A.3d at 814). The Fourth Circuit also appears to follow this tack. *See United States v. Johnson*, 400 F.3d 187, 199 (4th Cir. 2005) (holding that "failure to comply with [90-day rule] . . . provide[d no] basis for questioning . . . the restitution order.")

On the other hand, the United States Courts of Appeal have not reached a consensus on the true effect of the 90-day requirement. Circuit courts differ over whether a district court has the authority to order restitution after the 90-day interval has elapsed. Our own Tenth Circuit has indicated that a district court cannot modify a sentence based on its inherent authority. *United States v. Dando*, 287 F.3d 1007, 1009 (10th Cir. 2002). Rather, the Tenth Circuit indicates that a district court's authority to order restitution after sentencing "derives solely from the statutory grant of jurisdiction in 18 U.S.C. §§ 3664(d)(5)." *Id.* at 1009-10. The *Dando* court also noted that because notice and time requirements in jurisdictional statutes are generally mandatory, district courts lack authority unless the parties have

satisfied those requirements. *Id.* at 1010. Nevertheless, because of the procedural nature of the 90-day requirement, the Tenth Circuit has established that Section 3664(d0(5) is subject to equitable tolling[6] and that, so long as the court provides the defendant with the functional equivalent of the statutory procedure, a restitution order falling outside the 90-day requirement may stand. *See id.* at 1010-11; *United States v. Reano*, 298 F.3d 1208 (10th Cir. 2002). Although *Reano* acknowledges that Congress intended the MVRA to establish one consistent restitution procedure, 298 F.3d at 1212, both *Reano* and *Dando*

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[6] A number of other circuits also believe Section 3664(d)(5) may be subject to equitable tolling. *See United States v. Farr*, 419 F.3d 621, 626 n.3 (7th Cir. 2005) (noting that their prior statement that Section 3664(d)(5)'s limits 'can sometimes be bent' meant that tolling may be available); *United States v. Zakhary*, 357 F.3d 186, 192 (2nd Cir. 2004) (acknowledging that the court had previously alluded to tolling, but expressing a preference for the harmless error approach); *United States v. Terlingo*, 327 F.3d 216 (3rd Cir. 2003) (concluding that the 90-day requirement is subject to equitable tolling where the delay is caused in significant part by the defendant); *United States v. Maung*, 267 F.3d 1113, 1121 (11th Cir. 2001) (asserting that the government might be correct in its statement that the statute is subject to tolling); *Stevens*, 211 F.3d at 5 ("we hold that the 90-day clock in § 3664(d)(5) may be tolled by the defendant's own purposeful misconduct."); *Bogart*, 490 F. Supp. at 898-99 ("[Defendant] cannot now use the fact that he did not pay the restitution ordered at the sentencing hearing to prevent the [c]ourt from modifying the order."). No circuit, however, has tolled the statute in favor of the victim or those assisting the victim.

illustrate that sufficient notice[7] is the functional equivalent of the statutory procedure set forth in Section 3644(d)(50, *Reano*, 298 F.3d at 1212; *Dando*, 287 F.3d at 1010-11. Moreover, in both cases, the Tenth Circuit recognized that the respective plea agreements according the defendant with at least some portion of the necessary notice.[8] *See Reano*, 298

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[7] Several other circuits have also taken notice into consideration when examining whether Section 3664(d)(5) has a preclusive effect, especially when conducting harmless error analysis. *See Moreland*, 509 F.3d at 1225 (noting that the defendant knew restitution would be part of his sentence because the district judge stated it on the record during the original sentencing hearing); *United States v. Uhrich*, 228 F. App'x 248, 258 (4th Cir. 2007) (indicating that the court was unable to find reversible error where the defendant had notice of both the amount and recipient of the restitution); *United States v. Cienfuegos*, 462 F.3d 1660, 1163 (9th Cir. 2006) ("[Defendant] was provided the functional equivalent of the notice required under Section 3664(d)(5) by the terms of his plea agreement."); *Johnson*, 400 F.3d at 199 ("[Defendant] had notice of the amount sought, and the court held a . . . hearing before entering the restitution order."); *Vandeberg*, 201 F.3d at 814 (noting that "the court provided [defendant] with ample opportunity to object to the amount[,] . . . scheduled a number of conferences on the subject, and . . . conducted an evidentiary hearing in which [the defendant] himself testified."). *But see Maung*, 267 F.3d at 1121 (refusing to adopt government's argument that defendant was not prejudiced by the delay because head a full opportunity to contest restitution at a later hearing).

[8] In addition to the Ninth and Tenth Circuits, the Second Circuit also looks to the defendant's plea agreement when a restitution order falls outside the 90-day requirement. *See Zakhary*, 357 F.3d at 188 (pointing out that the prosecution, via the plea agreement,

F.3d at 1209, 1212; *Dando*, 287 F.3d at 1010. In fact, the Tenth Circuit has gone so far as to vacate and remand for resentencing, reinitiating the 90-day time period.[9] *Reano*, 298 F.3d at 1212-13.

The Sixth, Seventh, and Eleventh Circuits have issued seemingly incongruous opinions regarding Section 3664(d)(5). In 2000, the Sixth Circuit decided *Vandeberg*, 201 F.3d 805, which, while recognizing that the 90-day requirement was firm, also found that Section 3664(d)(5) was not jurisdictional and that failure to meet the 90-day requirement was harmless error. *See* 201 F.3d at 813-14. Despite *Vandeberg*, the court issued *United States v. Jolivette*, 257 F.3d 581 (6th Cir. 2001), less than a year later and pronounced that a district court's power to order restitution is circumscribed by Section 3664, that restitution ordered beyond the 90-day time limit is void, and that the statute demonstrates Congress' clear intent to "prohibit courts from making restitution

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had advised the defendant that he could be ordered to pay restitution); *United States v. Catoggio*, 326 F.3d 323 (2nd Cir. 2003) (reflecting plea agreement language that stated that "restitution was applicable, in an amount to be determined by the [c]ourt.").

[9] Other circuits have also remanded cases that failed to meet the 90-day requirement. *See Cienfuegos*, 462 F.3d at 1161, 1169; *Farr*, 419 F.3d at 626 n.3 (noting that they could restart the 90-day period); *Zakhary*, 357 F.3d at 188, 191-94; *Catoggio*, 326 F.3d at 324, 329-30; *United States v. Kapelushnik*, 306 F.3d 1090, 1092, 1095 (11th Cir. 2002); *United States v. Grimes*, 173 F.3d 634, 640 (7th Cir. 1999).

determinations after the statutory period has run." 257 F.3d at 583-84.

The Seventh Circuit decided *United States v. Grimes*, 173 F.3d 634 (7th Cir. 1999), in 1999, and while acknowledging that the district court had exceeded its authority in not resolving the restitution matter within 90 days, the court vacated and remanded the case because Section 3644 "confer[s] rights on victims, not on criminals." *See* 173 F.3d at 639-40. Nevertheless, in *United States v. Farr*, 419 F.3d 621 (7th Cir. 2005), the court denied that it had ever concluded that a district court could disregard the 90-day requirement for the benefit of a victim. 419 F.3d at 625. Despite *Grimes*, the court expressed its belief that the 90-day requirement was unambiguous and, consequently, the court could not overlook the statute's plain language to further a broader statutory purpose. *Id.* In refusing to allow the district court to order restitution as a condition of supervised release over three years after the original sentencing, the court stated that the district court had exceeded its authority because district courts only have authority to grant restitution as expressly granted in the statute. *See id.* at 623, 625.

The Eleventh Circuit appears to have taken the firmest stance against allowing restitution after the 90-day period has elapsed. In *United States v. Maung*, 267 F.3d 1113 (11th Cir. 2001), the court found the language of Section 3664(d)(5) was clear and there was, therefore, no need to look into the intent behind the MVRA. 267 F.3d at 1121-22. The court went on to state that Section 3664(d)(5) had a preclusive effect,

unless the result would be absurd—not just unwise. *Id.* at 1122. The court elaborated that an absurdity might occur when the defendant's bad faith caused the delay, but a typical delay only resulted in an unwise result. *Id.* Despite *Maung*, however, the court decided *United States v. Kapelushnik*, 306 F.3d 1090 (11th Cir. 2002), the following year. *Kapelushnik* vacated and remanded where the district court had not entered a restitution order within 90 days because the defendant had filed an appeal. *Id.*

Though some circuits have asserted that the district courts must always meet the 90-day requirement, practically every circuit to examine the issue has acknowledged that Congress intended the requirement to protect victims, and those assisting the victims, from the dissipation of defendants' assets, not to promote finality for the defendant. *See e.g., Dando*, 287 F.3d at 1010 n.4; *Reano*, 298 F.3d at 1212 ("[Restitution] is . . . necessary to ensure that the offender . . . pays the debt owed to the victim as well as to society."). Furthermore, Section 3664 grants defendants very few, if any, rights. *See Grimes*, 173 F.3d at 639. Indeed, Congress "did not relate the 90-day requirement to the interest of defendants." *Cheal*, 389 F.3d at 49. Rather "the sole due process interest of the defendant being protected during the sentencing phase is the right not to be sentenced on the basis of invalid premises or inaccurate information." *Id.* (quoting S. Rep. No. 104-179, at 18 (1995)). *See also Moreland*, 509 F.3d at 1223-24.

Appellate courts generally review restitution orders for an abuse of discretion. *E.g., Reano*, 298 F.3d

at 1210. If assertion of jurisdiction is at issue, however, appellate courts will engage in de novo review. *E.g., Dando*, 287 F.3d at 1009. Moreover, as alluded to above, several circuits then go on to engage in harmless error analysis because courts regularly deem sentencing errors that do not tread upon substantial rights as harmless. *See Moreland*, 509 F.3d at 1224-25. ("A presumption of harmlessness applies to any error in the timely identification of victims' losses."); *Johnson*, 400 F.3d at 199; *Zakhary*, 357 F.3d at 191-93; *Vandeberg*, 201 F.3d at 814. *See also Farr*, 419 F.3d at 626 (refusing to determine if harmless error analysis applied because the parties did not sufficiently raise the issue). In any such analysis, of course, the defendant must show prejudice by alleging that documents and/or witnesses had become unavailable or that his financial status had substantially changed during the delay. *Id.* at 192 n.5

2. The Court Retains Jurisdiction

While admitting that Section 3664(d)(5) is not an expressly jurisdictional statute (*see* Restitution Mem. [Doc. 47] at 3), Defendant nevertheless urges the Court to abide by the "plain language" of the statute and concede that the Court no longer has power to order Defendant to pay restitution (*id.* at 2). The Court, however, does retain jurisdiction that enables it to order Defendant to pay restitution.

As an initial point, Congress has moved the decision about whether to order restitution beyond the discretion of the Court. Restitution for crimes of violence is mandatory. 18 U.S.C. §§ 3663A(a)(1), -

(c)(1)(A)(i). Moreover, as Defendant admits, no court has expressly found that 18 U.S.C. § 3664(d)(5) is a jurisdictional statute. And while the Court acknowledges its error in not complying with the 90-day requirement, holding that the Court loses jurisdiction 90 days after sentencing would render the clause allowing victims to recover subsequently discovered losses meaningless.[10] *See Cheal*, 389 F.3d at 48. Additionally, the MVRA contains a clause particularly called for in this situation: "[n]otwithstanding any other provision of law." 18 U.S.C. §§ 3663A(a)(1).

As for Defendant's plain language argument, the vast array of positions taken by the circuit courts is more than sufficient to establish that the statute's language is, in fact, ambiguous. Consequently, the Court must look to Congressional intent to decipher the true meaning of Section 3664(d)(5). *Contra Farr*, 419 F.3d at 625; *Maung*, 267 F.3d at 1121-22. Practically every circuit to examine Section 3664(d)(5), including the Tenth Circuit, has acknowledged that the 90-day time requirement is meant to protect the victim and, by extension, those assisting the victim—

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[10] The Court does not believe this conflicts with the Tenth Circuit's holding that the Court's restitution jurisdiction derives solely from Section 3664(d)(5). Though the provision admittedly sets out a 90-day requirement, the same provision also grants the Court continuing jurisdiction to deal with further victim losses. The Court does not believe that Congress intended to create a "gap" in jurisdiction.

not the defendant. *See e.g., Dando*, 287 F.3d at 1010 n.4. As a result, the section confers minimal rights upon the defendant. *See Moreland*, 509 F.3d at 1223-24; *Cheal*, 389 F.3d at 49. Those rights do not include the absolute right to have a finalized restitution order within 90 days of sentencing. *Cf. Cheal*, 389 F.3d at 49 ("the sole due process interest of the defendant being protected during the sentencing phase is the right not to be sentenced on the basis of invalid premises or inaccurate information."). Allowing a defendant to escape restitution simply because of a fortuitous chain of events would hardly serve the interests of justice. *See id.*

At oral argument, Defendant contended that the functional equivalent of Section 3664(d)(5) requires both notice and time limitations. (Apr. 11 Sentencing Hr'g Tr. at 3). The Tenth Circuit, however, has not found that the statute's functional equivalent must include a specified time element. *See Reano*, 298 F.3d at 1212; *Dando*, 287 F.3d at 1010-11. Notice serves as the functional equivalent of Section 3664(d)(5), *Reano*, 298 F.3d at 1212; *Dando*, 287 F3d at 1010-11, and the Defendant certainly had notice that the Court would require him to pay restitution. The plea agreement, the PSR, the initial sentencing hearing, the Judgment, and the Second Addendum to the PSR all provided notice to the Defendant during the 90-day period. The February and April hearings also provided the Defendant with further notice and opportunity to object, and the Defendant readily admits that he had notice. (Apr. 11 Sentencing Hr'g Tr. at 5, 7). Moreover, the Judgment clearly indicates that the defendant

would be required to pay restitution on supervised release (Judgment at 3), and unlike in *Farr*, the Court is not ordering restitution more than three years after the original sentencing hearing.

Defendant also argues that the Court cannot assert jurisdiction because Defendant's actions did not toll the statute. (Apr. 11 Sentencing Hr'g Tr. at 4-5). Although both *Dando* and *Reano* involve some element of tolling, the Tenth Circuit has not absolutely required that a district court can be confronted with a tolling situation to enable it to order restitution after the 90-day period has elapsed. *See Reano*, 298 F.3d 1208; *Dando*, 287 F.3d 1007. As mentioned previously, the Tenth Circuit does require the functional equivalent of statutory notice, and that is present in this case. Additionally, the Court sees no reason why a defendant should reap the equitable benefits of a procedural requirement while the victim and those assisting the victim may not.

Lastly, at oral argument, Defendant could not show that he would suffer prejudice s the result of an untimely restitution order. (Apr. 11 Sentencing Hr'g Tr. at 7). He has not alleged that his financial situation has changed substantially, nor has he alleged that any documents or witnesses have become unavailable. *See Zakhary*, 375 F.3d at 192 n.5. If a presumption of harmlessness applies, Defendant has demonstrated no prejudice affecting his substantial rights. *See Moreland*, 509 F.3d at 1224-25.

Because restitution is mandatory for crimes of violence, because Congress intended Section 3664(d)(5)

to protect victims and those assisting victims, because Defendant received the functional equivalent of statutory notice, and because Defendant is unable to demonstrate prejudice, the Court CONCLUDES that it RETAINS JURISDICTION.

B. Defendant's Ability to Pay

The MVRA requires a court to order full restitution "without consideration of the economic circumstances of the defendant." 18 U.S.C. § 3664(f)(1)(A) (2008). The government bears the burden of establishing the victim's losses by a preponderance of the evidence. *Id.* at § 3664(e). The defendant bears the burden of "demonstrating [his] financial resources . . . and the financial needs of . . . [his] dependents" by a preponderance of the evidence. *Id.* Although a district court may not take the defendant's financial situation into account when determining the amount of restitution, the Court must take it into account when setting the payment schedule. *See id.* at § 3664(f)(2)(A)-(C); *United States v. Ahidley*, 486 F.3d 1184, 1191-93 (10th Cir. 2007). Specifically, the court must consider:

> (A) the financial resources and other assets of the defendant, including whether any of these assets are jointly controlled;
>
> (B) projected earnings and other income of the defendant; and
>
> (C) any financial obligations of the defendant; including obligations to dependents.

18 U.S.C. § 3664(f)(2). If, however, the court finds that the defendant's financial situation does not permit the payment of any restitution and does not permit the payment of full restitution "in the foreseeable future under any reasonable schedule of payments," the court may order "the defendant to make nominal period payments." *Id.* at § 3664(f)(3)(B).

Defendant is thirty years old (*see* PSR at ¶ 62). Before his incarceration, Defendant lived either at his parents' home or his girlfriend's home. (*Id.* at ¶ 66). Since his release, Defendant has lived with his elderly aunt and uncle who live on retirement assistance. (Apr. 11 Sentencing Hr'g Tr. at 12). His father is currently incarcerated, and his parents live on a limited income. (*Id.* at 12-13).

Defendant relies entirely on his aunt for his support. (*Id.* at 13). Defendant holds no assets, and his credit report reflects one outstanding balance for medical care. (PSR at ¶¶ 83-84). It appears that Defendant's only income is half of his annual tribal stipend, $575.00, the other half having been previously assigned for the benefit of a minor child. (Apr. 11 Sentencing Hr'g Tr. at 16-17). Defendant dropped out of high school, but he did earn his G.E.D. during a prior incarceration. (PSR at ¶ 77). Defendant was unemployed at the time of this offense (*id.* at ¶ 73), and he currently remains unemployed (Apr. 11 Sentencing Hr'g Tr. at 14). Defendant has apparently never held a steady job (PSR at 26; Apr. 11 Sentencing Hr'g Tr. at 11-12).

Defendant has one eleven-year-old daughter to whom he occasionally provided financial support before his incarceration. (*Id.* at 13; PSR at ¶ 68). Defendant also has another two-year-old daughter. (Apr. 11 Sentencing Hr'g Tr. at 13; PSR at ¶ 69). Since his release, Defendant has been unable to provide any financial support to his children other than the $575.00 that is provided to the eleven-year-old. (Apr. 11 Sentencing Hr'g Tr. at 13-14; 16-17).

Defendant has been admitted for mental health evaluations on at least four occasions and has reportedly been diagnosed as bi-polar. (*See* PSR at ¶¶ 71-73). Defendant has also experienced severe substance abuse problems since at least the age of twelve. (*See* PSR at ¶¶ 74-76).

Taking Defendant's aforementioned lack of financial resources, income, assets, and potential for future earnings into account, as well as noting the Defendant's obligations to his daughters, 18 U.S.C. § 3664(f)(2)(A)-(C), the Court finds that Defendant has established that his financial situation does not permit the payment of any significant amount of restitution now or in the foreseeable future, *id.* at § 3664(f)(3)(B). Consequently, the Court hereby ORDERS the Defendant to pay $104,649.78 in restitution in nominal period payments. *Id.* These periodic payments shall take the form of a monthly $250.00 payment.

III. CONCLUSION

Because restitution is mandatory for crimes of violence, because Congress intended Section 3664(d)(5) to protect victims and those assisting victims, because Defendant received the functional equivalent of statutory notice, and because Defendant is unable to demonstrate prejudice, the Court CONCLUDES that it RETAINS JURISDICTION. Moreover, because the Court finds that Defendant has established that his financial situation does not permit the payment of any significant amount of restitution now or in the foreseeable future, the Court hereby ORDERS the Defendant to pay $104,649.78 in restitution in nominal period payments of $250.00 per month.

IT IS SO ORDERED.

/S/

ROBERT C. BRACK

UNITED STATES DISTRICT JUDGE

APPENDIX C
RELEVANT STATUTORY PROVISIONS

§ 3663A. Mandatory restitution to victims of certain crimes

(a) (1) Notwithstanding any other provision of law, when sentencing a defendant convicted of an offense described in subsection (c), the court shall order, in addition to, or in the case of a misdemeanor, in addition to or in lieu of, any other penalty authorized by law, that the defendant make restitution to the victim of the offense or, if the victim is deceased, to the victim's estate.

(2) For the purposes of this section, the term "victim" means a person directly and proximately harmed as a result of the commission of an offense for which restitution may be ordered including, in the case of an offense that involves as an element a scheme, conspiracy, or pattern of criminal activity, any person directly harmed by the defendant's criminal conduct in the course of the scheme, conspiracy, or pattern. In the case of a victim who is under 18 years of age, incompetent, incapacitated, or deceased, the legal guardian of the victim or representative of the victim's estate, another family member, or any other person appointed as suitable by the court, may assume the victim's rights under this section, but in no event shall the defendant be named as such representative or guardian.

(3) The court shall also order, if agreed to by the parties in a plea agreement, restitution to persons other than the victim of the offense.

(b) The order of restitution shall require that such defendant--

(1) in the case of an offense resulting in damage to or loss or destruction of property of a victim of the offense--

(A) return the property to the owner of the property or someone designated by the owner; or

(B) if return of the property under subparagraph (A) is impossible, impracticable, or inadequate, pay an amount equal to--

(i) the greater of--

(I) the value of the property on the date of the damage, loss, or destruction; or

(II) the value of the property on the date of sentencing, less

(ii) the value (as of the date the property is returned) of any part of the property that is returned;

(2) in the case of an offense resulting in bodily injury to a victim--

(A) pay an amount equal to the cost of necessary medical and related professional services and devices relating to physical, psychiatric, and psychological care, including nonmedical care and treatment rendered in accordance with a method of healing recognized by the law of the place of treatment;

(B) pay an amount equal to the cost of necessary physical and occupational therapy and rehabilitation; and

(C) reimburse the victim for income lost by such victim as a result of such offense;

(3) in the case of an offense resulting in bodily injury that results in the death of the victim, pay an amount equal to the cost of necessary funeral and related services; and

(4) in any case, reimburse the victim for lost income and necessary child care, transportation, and other expenses incurred during participation in the investigation or prosecution of the offense or attendance at proceedings related to the offense.

(c)(1) This section shall apply in all sentencing proceedings for convictions of, or plea agreements relating to charges for, any offense--

(A) that is--

(i) a crime of violence, as defined in section 16;

(ii) an offense against property under this title, or under section 416(a) of the Controlled Substances Act, including any offense committed by fraud or deceit; or

(iii) an offense described in section 1365 (relating to tampering with consumer products); and

(B) in which an identifiable victim or victims has suffered a physical injury or pecuniary loss.

(2) In the case of a plea agreement that does not result in a conviction for an offense described in paragraph (1), this section shall apply only if the plea specifically states that an offense listed under such paragraph gave rise to the plea agreement.

(3) This section shall not apply in the case of an offense described in paragraph (1)(A)(ii) if the court finds, from facts on the record, that--

(A) the number of identifiable victims is so large as to make restitution impracticable; or

(B) determining complex issues of fact related to the cause or amount of the victim's losses would complicate or prolong the sentencing process to a degree that the need to provide restitution to any victim is outweighed by the burden on the sentencing process.

(d) An order of restitution under this section shall be issued and enforced in accordance with section 3664.

§ 3664. Procedure for issuance and enforcement of order of restitution

(a) For orders of restitution under this title, the court shall order the probation officer to obtain and include in its presentence report, or in a separate report, as the court may direct, information sufficient for the court to exercise its discretion in fashioning a restitution order. The report shall include, to the extent practicable, a complete accounting of the losses to each victim, any restitution owed pursuant to a plea

agreement, and information relating to the economic circumstances of each defendant. If the number or identity of victims cannot be reasonably ascertained, or other circumstances exist that make this requirement clearly impracticable, the probation officer shall so inform the court.

(b) The court shall disclose to both the defendant and the attorney for the Government all portions of the presentence or other report pertaining to the matters described in subsection (a) of this section.

(c) The provisions of this chapter, chapter 227, and Rule 32(c) of the Federal Rules of Criminal Procedure shall be the only rules applicable to proceedings under this section.

(d) (1) Upon the request of the probation officer, but not later than 60 days prior to the date initially set for sentencing, the attorney for the Government, after consulting, to the extent practicable, with all identified victims, shall promptly provide the probation officer with a listing of the amounts subject to restitution.

(2) The probation officer shall, prior to submitting the presentence report under subsection (a), to the extent practicable--

(A) provide notice to all identified victims of--

(i) the offense or offenses of which the defendant was convicted;

(ii) the amounts subject to restitution submitted to the probation officer;

(iii) the opportunity of the victim to submit information to the probation officer concerning the amount of the victim's losses;

(iv) the scheduled date, time, and place of the sentencing hearing;

(v) the availability of a lien in favor of the victim pursuant to subsection (m)(1)(B); and

(vi) the opportunity of the victim to file with the probation officer a separate affidavit relating to the amount of the victim's losses subject to restitution; and

(B) provide the victim with an affidavit form to submit pursuant to subparagraph (A)(vi).

(3) Each defendant shall prepare and file with the probation officer an affidavit fully describing the financial resources of the defendant, including a complete listing of all assets owned or controlled by the defendant as of the date on which the defendant was arrested, the financial needs and earning ability of the defendant and the defendant's dependents, and such other information that the court requires relating to such other factors as the court deems appropriate.

(4) After reviewing the report of the probation officer, the court may require additional documentation or hear testimony. The privacy of any records filed, or testimony heard, pursuant to this section shall be maintained to the greatest extent possible, and such records may be filed or testimony heard in camera.

(5) If the victim's losses are not ascertainable by the date that is 10 days prior to sentencing, the attorney for the Government or the probation officer shall so inform the court, and the court shall set a date for the final determination of the victim's losses, not to exceed 90 days after sentencing. If the victim subsequently discovers further losses, the victim shall have 60 days after discovery of those losses in which to petition the court for an amended restitution order. Such order may be granted only upon a showing of good cause for the failure to include such losses in the initial claim for restitutionary relief.

(6) The court may refer any issue arising in connection with a proposed order of restitution to a magistrate judge or special master for proposed findings of fact and recommendations as to disposition, subject to a de novo determination of the issue by the court.

(e) Any dispute as to the proper amount or type of restitution shall be resolved by the court by the preponderance of the evidence. The burden of demonstrating the amount of the loss sustained by a victim as a result of the offense shall be on the attorney for the Government. The burden of demonstrating the financial resources of the defendant and the financial needs of the defendant's dependents, shall be on the defendant. The burden of demonstrating such other matters as the court deems appropriate shall be upon the party designated by the court as justice requires.

(f) (1) (A) In each order of restitution, the court shall order restitution to each victim in the full amount of each victim's losses as determined by the court and without consideration of the economic circumstances of the defendant.

(B) In no case shall the fact that a victim has received or is entitled to receive compensation with respect to a loss from insurance or any other source be considered in determining the amount of restitution.

(2) Upon determination of the amount of restitution owed to each victim, the court shall, pursuant to section 3572 [*18 USCS § 3572*], specify in the restitution order the manner in which, and the schedule according to which, the restitution is to be paid, in consideration of--

(A) the financial resources and other assets of the defendant, including whether any of these assets are jointly controlled;

(B) projected earnings and other income of the defendant; and

(C) any financial obligations of the defendant; including obligations to dependents.

(3) (A) A restitution order may direct the defendant to make a single, lump-sum payment, partial payments at specified intervals, in-kind payments, or a combination of payments at specified intervals and in-kind payments.

(B) A restitution order may direct the defendant to make nominal periodic payments if the court finds from facts on the record that the economic

circumstances of the defendant do not allow the payment of any amount of a restitution order, and do not allow for the payment of the full amount of a restitution order in the foreseeable future under any reasonable schedule of payments.

(4) An in-kind payment described in paragraph (3) may be in the form of--

(A) return of property;

(B) replacement of property; or

(C) if the victim agrees, services rendered to the victim or a person or organization other than the victim.

(g) (1) No victim shall be required to participate in any phase of a restitution order.

(2) A victim may at any time assign the victim's interest in restitution payments to the Crime Victims Fund in the Treasury without in any way impairing the obligation of the defendant to make such payments.

(h) If the court finds that more than 1 defendant has contributed to the loss of a victim, the court may make each defendant liable for payment of the full amount of restitution or may apportion liability among the defendants to reflect the level of contribution to the victim's loss and economic circumstances of each defendant.

(i) If the court finds that more than 1 victim has sustained a loss requiring restitution by a defendant, the court may provide for a different payment schedule

for each victim based on the type and amount of each victim's loss and accounting for the economic circumstances of each victim. In any case in which the United States is a victim, the court shall ensure that all other victims receive full restitution before the United States receives any restitution.

(j) (1) If a victim has received compensation from insurance or any other source with respect to a loss, the court shall order that restitution be paid to the person who provided or is obligated to provide the compensation, but the restitution order shall provide that all restitution of victims required by the order be paid to the victims before any restitution is paid to such a provider of compensation.

(2) Any amount paid to a victim under an order of restitution shall be reduced by any amount later recovered as compensatory damages for the same loss by the victim in--

(A) any Federal civil proceeding; and

(B) any State civil proceeding, to the extent provided by the law of the State.

(k) A restitution order shall provide that the defendant shall notify the court and the Attorney General of any material change in the defendant's economic circumstances that might affect the defendant's ability to pay restitution. The court may also accept notification of a material change in the defendant's economic circumstances from the United States or from the victim. The Attorney General shall certify to the court that the victim or victims owed restitution by the defendant have been notified of the

change in circumstances. Upon receipt of the notification, the court may, on its own motion, or the motion of any party, including the victim, adjust the payment schedule, or require immediate payment in full, as the interests of justice require.

(*l*) A conviction of a defendant for an offense involving the act giving rise to an order of restitution shall estop the defendant from denying the essential allegations of that offense in any subsequent Federal civil proceeding or State civil proceeding, to the extent consistent with State law, brought by the victim.

(m) (1) (A) (i) An order of restitution may be enforced by the United States in the manner provided for in subchapter C of chapter 227 and subchapter B of chapter 229 of this title; or

(ii) by all other available and reasonable means.

(B) At the request of a victim named in a restitution order, the clerk of the court shall issue an abstract of judgment certifying that a judgment has been entered in favor of such victim in the amount specified in the restitution order. Upon registering, recording, docketing, or indexing such abstract in accordance with the rules and requirements relating to judgments of the court of the State where the district court is located, the abstract of judgment shall be a lien on the property of the defendant located in such State in the same manner and to the same extent and under the same conditions as a judgment of a court of general jurisdiction in that State.

(2) An order of in-kind restitution in the form of services shall be enforced by the probation officer.

(n) If a person obligated to provide restitution, or pay a fine, receives substantial resources from any source, including inheritance, settlement, or other judgment, during a period of incarceration, such person shall be required to apply the value of such resources to any restitution or fine still owed.

(o) A sentence that imposes an order of restitution is a final judgment notwithstanding the fact that--

(1) such a sentence can subsequently be--

(A) corrected under Rule 35 of the Federal Rules of Criminal Procedure and section 3742 of chapter 235 of this title;

(B) appealed and modified under section 3742;

(C) amended under subsection (d)(5); or

(D) adjusted under section 3664(k), 3572, or 3613A; or

(2) the defendant may be resentenced under section 3565 or 3614.

OPPOSITION BRIEF

Supreme Court, U.S.
FILED
NOV 27 2009
OFFICE OF THE CLERK

No. 09-367

In the Supreme Court of the United States

BRIAN RUSSELL DOLAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

When the victim of a defendant's crime is entitled to restitution and the victim's loss is not ascertainable at least ten days before the defendant's sentencing, 18 U.S.C. 3664(d)(5) provides that "the court shall set a date for the final determination of the victim's losses, not to exceed 90 days after sentencing," subject to a good-cause extension for losses discovered later. The question presented is:

Whether a district court's failure to calculate restitution within 90 days after sentencing is per se prejudicial error that requires that the restitution award be vacated.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The order of the court of appeals granting panel rehearing in part (Pet. App. 1a-3a) is unreported. The amended opinion of the court of appeals (Pet. App. 4a-26a) is reported at 571 F.3d 1022. The opinion and order of the district court (Pet. App. 27a-48a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 27, 2009. A petition for rehearing was granted in part on June 26, 2009 (Pet. App. 1a-3a). The petition for a writ of certiorari was filed on September 23, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the District of New Mexico, petitioner was convicted of assault resulting in serious bodily injury, in violation of 18 U.S.C. 113(a)(6) and 1153. Pet. App. 6a. He was sentenced to 21 months of imprisonment, to be followed by three years of supervised release, and was ordered to pay $104,649.78 in restitution. The court of appeals affirmed. Pet. App. 4a-26a.

1. On September 9, 2006, petitioner picked up a hitchhiker, on an Indian reservation in southeastern New Mexico. The two men began to argue, and petitioner assaulted the hitchhiker, leaving him on the side of the road, bleeding and unconscious, where a police officer discovered him. The victim sustained serious injuries, including a broken nose, wrist, leg, and ribs. Pet. App. 5a-6a, 28a-29a; Gov't C.A. Br. 4-5.

2. A grand jury in the District of New Mexico returned an indictment charging petitioner with assault resulting in serious bodily injury, in violation of 18 U.S.C. 113(a)(6) and 1153. Petitioner pleaded guilty. Pet. App. 6a; Gov't C.A. Br. 1.

At a sentencing hearing on July 30, 2007, the district court stated that it had "insufficient information" to determine the amount of restitution petitioner owed. Pet. App. 29a-30a. Accordingly, the district court left the issue of restitution "open, pending the receipt of additional information," while informing petitioner that he should "anticipate that such an award will be made in the future. *Id.* at 30a. The court entered judgment the same day, and the judgment stated that restitution was applicable but that the court was awaiting information about the amount owed. *Id.* at 30a-31a.

On February 4, 2008, the district court held a hearing on restitution. Petitioner argued that the district court no longer had the authority to order restitution because it had missed the deadline set forth in 18 U.S.C. 3664(d)(5), which requires that the court "set a date for the final determination of the victim's losses, not to exceed 90 days after sentencing." During a subsequent hearing on the issue, defense counsel conceded that petitioner had notice of the restitution amount within the 90-day period, and that "[w]e always knew restitution would be an issue." Gov't C.A. Br. 3 (quoting 4/11/08 Tr. 8); Pet. App. 8a.

On April 24, 2008, the district court entered a memorandum opinion and order in which the court concluded that it still had the authority to issue a restitution order, notwithstanding the expiration of the 90-day period. It ordered petitioner to pay restitution of $104,649.78 in monthly payments of $250. Pet. App. 27a-48a; Gov't C.A. Br. 4.

3. The court of appeals affirmed. Pet. App. 4a-26a. The court rejected petitioner's argument that Section 3664(d)(5) imposes a "jurisdictional bar to untimely restitution orders." *Id.* at 5a. After considering the statutory language, the legislative history, and its own prior case law, the court of appeals concluded that "Congress did not intend to divest the district court of all power over restitution awards after 90 days." *Id.* at 11a. Instead, the court of appeals concluded that Section 3664 established a "claims processing procedure" that was intended to "ensur[e] the timely completion of * * * statutory obligations to the public," not to restrict "federal court subject matter jurisdiction." *Id.* at 11a, 13a.

In reaching that conclusion, the court of appeals distinguished between mandatory deadlines for litigants,

such as the deadline for filing a notice of appeal, and "mandatory obligations on government officials to perform duties on behalf of the public." Pet. App. 15a. With respect to the latter category of obligations, the court concluded that the failure to perform as Congress intended did not eliminate the obligation itself, observing that "[i]t would be a strange thing indeed if a bureaucracy or court could avoid a congressional mandate by unlawful delay." *Id.* at 13a. The court found it unnecessary to consider what remedy might be appropriate if the defendant could establish prejudice from the delay, noting that petitioner "does not purport to identify any way in which his substantial rights were infringed by the district court's decision requiring him to pay restitution later rather than sooner." *Id.* at 21a. Finally, the court held that the district court's determination of the amount of restitution had adequately accounted for petitioner's financial condition. *Id.* at 22a-26a.

ARGUMENT

Petitioner contends (Pet. 8) that this case implicates "an ever-widening circuit split" on whether 18 U.S.C. 3664(d)(5) precludes the entry of a restitution award more than 90 days after sentencing. That is incorrect. Because petitioner's appeal challenged only the district court's jurisdiction to enter a restitution order, this case is an inappropriate vehicle for considering the question petitioner now attempts to raise. In any event, the court of appeals noted that petitioner had made no effort to show that he was prejudiced by the district court's delay in imposing restitution, and under those circumstances, seven courts of appeals have held that Section 3664(d)(5) does not preclude the delayed entry of a restitution

award. Although the Eleventh Circuit has taken a contrary view, its decision predates most of the other decisions addressing the issue, and there is reason to believe that the court may reconsider its position. This Court recently denied review in a case presenting this question, see *United States* v. *Dupre*, 129 S. Ct. 2158 (2009), and further review is likewise unwarranted here.

1. Congress enacted the Mandatory Victims Restitution Act of 1996 (MVRA), Pub. L. No. 104-132, Tit. II, Subtit. A, 110 Stat. 1227, to make restitution mandatory for all victims of specified crimes, without regard to the defendant's ability to pay. See S. Rep. No. 179, 104th Cong., 1st Sess. 18-20 (1995). Under the MVRA, the district court "shall order * * * that the defendant make restitution to the victim of the offense." 18 U.S.C. 3663A(a)(1). To accomplish its aim of establishing and enforcing restitution orders, the MVRA imposes statutory deadlines on various actors at sentencing. The government must provide the probation officer with a list of known victims and suggested restitution amounts "not later than 60 days prior to the date initially set for sentencing." 18 U.S.C. 3664(d)(1). "If the victim's losses are not ascertainable by the date that is 10 days prior to sentencing, the attorney for the Government or the probation officer shall so inform the court, and the court shall set a date for the final determination of the victim's losses, not to exceed 90 days after sentencing." 18 U.S.C. 3664(d)(5). The 90-day period may be extended if a victim, with "good cause," subsequently discovers further losses. *Ibid.*

2. In the court of appeals, petitioner argued that the district court lost jurisdiction to enter a restitution or-

der once 90 days had elapsed after sentencing.[1] The court of appeals understood that petitioner was raising such a challenge, and therefore it considered whether the 90-day time limit in Section 3664 was intended to "strip a court of subject matter jurisdiction to entertain a dispute." Pet. App. 11a. It correctly answered that question in the negative. As this Court has explained, "jurisdiction" refers only to "the courts' statutory or constitutional *power* to adjudicate [a] case." *United States* v. *Cotton*, 535 U.S. 625, 630 (2002) (quoting *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 89 (1998)); *Kontrick* v. *Ryan*, 540 U.S. 443, 454-455 (2004); cf. *Bowles* v. *Russell*, 551 U.S. 205, 210 (2007) (discussing this Court's "longstanding treatment of statutory time limits *for taking an appeal* as jurisdictional") (emphasis added).

Petitioner now concedes that Section 3664(d)(5) is not "jurisdictional," arguing instead that it is "an inflexible claim-processing rule." Pet. App. 29 (quoting *Kontrick*, 540 U.S. at 456). Because petitioner failed to raise that argument below, this case is not an appropriate vehicle for considering it.[2]

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[1] See, *e.g.*, Pet. C.A. Br. 1 (stating, in the "Jurisdictional Statement," that "at issue in this appeal is whether the district court had jurisdiction under the [MVRA] § 3664(d)(5), to impose restitution more than 90 days after sentencing"); *ibid.* (identifying the "Issue Presented for Review" as "[w]hether the district court lacked jurisdiction pursuant to 18 U.S.C. § 3664(d)(5) to order restitution over 90 days after sentencing"); *id.* at 9 (asserting that "[t]he district court lacked jurisdiction to order restitution 268 days after [petitioner's] sentencing"); *id.* at 10 (arguing that "[t]he Court reviews de novo the district court's legal conclusion that it had jurisdiction"); see also *id.* at 17.

[2] Petitioner criticizes the court of appeals (Pet. 29) for "its assumption that if Section 3664(d)(5) was not 'jurisdictional' in the strongest sense of the word * * * then untimely restitution orders are permissi-

2. Even if petitioner had preserved his argument that Section 3664(d)(5) is a non-jurisdictional but "inflexible" procedural rule, that argument would not merit this Court's review. Under Rule 52(a) of the Federal Rules of Criminal Procedure, "[a]ny error, defect, irregularity, or variance that does not affect substantial rights must be disregarded." Presumptively, Rule 52(a) applies to "*all* errors where a proper objection is made." *Neder* v. *United States*, 527 U.S. 1, 7 (1999); see *United States* v. *Montalvo-Murillo*, 495 U.S. 711, 722 (1990) (calling Rule 52's "principle of harmless-error analysis * * * the governing precept in most matters of criminal procedure"). This Court requires "strong support" before it will conclude that another provision has repealed Rule 52 by implication. *Zedner* v. *United States*, 547 U.S. 489, 507 (2006) (quoting *United States* v. *Vonn*, 535 U.S. 55, 65 (2002)). Moreover, when a statute fails to specify any particular consequence for noncompliance with a timing provision, courts typically do not impose their own coercive remedy. See *Barnhart* v. *Peabody Coal Co.*, 537 U.S. 149, 157-163 (2003); *United States* v. *James Daniel Good Real Prop.*, 510 U.S. 43, 63 (1993).

Those courts of appeals that have considered the application of Rule 52 to the MVRA have all concluded that a violation of the MVRA's timing provisions does not necessitate voiding of the restitution order. For

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ble." But petitioner made just that assumption in his brief, arguing that "[i]n the event [the court of appeals] finds that the district court did have jurisdiction to order restitution," the court should proceed to review the amount of the order—without regard to its timeliness—by holding that "the district court failed to impose a restitution payment schedule that takes into consideration [petitioner's] financial resources, assets, projected income and financial obligations, as required by 18 U.S.C. § 3664(f)(2)." Pet. C.A. Br. 10.

example, the Second Circuit, examining the purpose behind the MVRA, recognized that its intent was to award restitution in all cases and that the 90-day time limit was inserted by Congress to "protect crime victims from the willful dissipation of defendants' assets," not to protect defendants. *United States* v. *Zakhary*, 357 F.3d 186, 191, cert. denied, 541 U.S. 1092 (2004). For that reason, seven courts of appeals (including the court below) have concluded that a district court's delay in issuing a restitution order should not inure to the defendant's benefit, at least where the defendant was not prejudiced by that error. Pet. App. 20a-21a; *United States* v. *Bogart*, 576 F.3d 565, 573 (6th Cir. 2009) ("[T]he district court's error in failing to comply with § 3664(d)(5) was harmless."); *United States* v. *Balentine*, 569 F.3d 801, 807 (8th Cir. 2009) (affirming order where defendant did "not contend that entry of the untimely restitution order impeded her ability to dispute the amount of restitution"), petition for cert. pending, No. 09-6760 (filed Sept. 28, 2009); *United States* v. *Marks*, 530 F.3d 799, 812 (9th Cir. 2008) ("[B]ecause the procedural requirements of section 3664 were designed to protect victims, not defendants, the failure to comply with them is harmless error absent actual prejudice to the defendant.") (citations omitted); *United States* v. *Johnson*, 400 F.3d 187, 199 (4th Cir.) ("just as the failure to conform with the ninety-day limit constitutes harmless error absent prejudice, so too does the failure to comply with [a separate] ten-day limit [in Section 3664(d)(5)]"), cert. denied, 546 U.S. 856 (2005); *Zakhary*, 357 F.3d at 191; cf. *United States* v. *Cheal*, 389 F.3d 35, 48-49 & n.15 (1st Cir. 2004) (reviewing for plain error a violation of the 90-day limit to which the defendant did not object in the district court).

The decision below is fully consistent with those decisions, because the court of appeals determined that the delay in imposing restitution did not prejudice petitioner, explaining that petitioner had not "identif[ied] any way in which his substantial rights were infringed by the district court's decision requiring him to pay restitution later rather than sooner." Pet. App. 21a. The court expressly reserved the question of what remedy would be appropriate, if any, in a case where "a defendant could establish prejudice arising from the district court's failure to enter restitution within the 90-day deadline," and that issue is not presented here. *Id.* at 20a.

3. Two early court of appeals decisions interpreting the MVRA concluded that a failure to quantify a restitution award within the time period specified in Section 3664(d)(5) voids the award. In *United States* v. *Jolivette*, 257 F.3d 581 (6th Cir. 2001), the district court included an open-ended restitution order, which the government conceded on appeal should be removed from the judgment. *Id.* at 582. The court of appeals held that the 90-day limit "makes clear the congressional intent to prohibit courts from making restitution determinations after the statutory period has run," that the judgment therefore contained no enforceable restitution provision, and that the judgment was consequently final for purposes of appellate review. *Id.* at 584.[3] Similarly, in

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[3] The Sixth Circuit in *Jolivette* believed that, in order to find appellate jurisdiction, it first had to conclude that no further restitution proceedings would take place in the district court. See 257 F.3d at 583-584. Congress has since amended the MVRA to make clear that, once a restitution order is included in the judgment, the further proceedings to which the 90-day limit applies do not affect the finality of the district

United States v. *Maung*, 267 F.3d 1113 (2001), the Eleventh Circuit, relying on *Jolivette*, concluded that a restitution order imposed more than 90 days after sentencing was invalid and untimely, and it refused to examine whether the defendant was prejudiced by the delay. *Id* at 1120-1122. Instead, the court concluded that "there is no prejudice requirement in the statute, and we are not convinced that we should read one into it." *Id.* at 1121.

No other court of appeals has followed either *Jolivette* or *Maung*. To the contrary, the Sixth Circuit recently reconsidered and rejected its prior opinion in *Jolivette*. In *Bogart*, the court concluded that the expiration of the 90-day time period "does not deprive a district court of jurisdiction over a defendant's restitution proceedings," 576 F.3d at 571, and it went on to determine that "the district court's error in failing to comply with § 3664(d)(5) was harmless." *Id.* at 573.[4]

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court's judgment or the jurisdiction of the court of appeals to review that judgment. See 18 U.S.C. 3664(*o*)(1)(C).

[4] Petitioner contends (Pet. 17-20) that harmless-error analysis applies in the Sixth Circuit only when the district court enters an "initial" order within the 90-day time limit that does not specify the final amount of restitution. That interpretation of the court's case law makes little sense. Section 3664(d)(5) requires a "final determination" of the defendant's restitution obligation within 90 days of sentencing, so an "initial" order that fails to make such a determination would not comply with the statute. And there is no reason why harmless-error analysis would apply to such an error under Section 3664(d)(5) but not to a different error under the same provision, such as when the district court fails to enter any restitution order at all. In any event, the judgment here made clear that the district court intended to award restitution (Pet. App. 7a), so even under petitioner's interpretation of its cases, the Sixth Circuit would have reached the same result as the court below.

As a result, the Eleventh Circuit now stands alone in holding invalid all restitution orders issued outside the time period specified in Section 3664(d)(5). In an appropriate case, that court too may disavow its precedent in light of the more recent persuasive authority and closer examination of the issue by its sister circuits, just as the Sixth Circuit did in *Bogart*. See *e.g.*, *United States* v. *Garey*, 540 F.3d 1253 (2008) (unanimous en banc decision bringing the Eleventh Circuit's law on waiving the right to counsel through conduct into line with the rule in other circuits). Indeed, the Eleventh Circuit already has suggested, in dicta, that the 90-day time limit may be subject to equitable tolling in appropriate circumstances. See *United States* v. *Johnson*, 541 F.3d 1064, 1067-1068 (2008), cert. denied, 129 S. Ct. 2792 (2009).

4. Petitioner exaggerates the magnitude of the split in authority. First, he contends (Pet. 10-12) that in *United States* v. *Farr*, 419 F.3d 621 (2005), the Seventh Circuit "held that a district court does not have the power to order restitution if it fails to follows the time limit imposed by Section 3664(d)(5)." Pet. 10. In fact, *Farr* declined to address whether the harmless-error standard could be applied to Section 3664(d)(5), as the government had insufficiently raised the issue. 419 F.3d at 626 ("We have not had occasion to decide the issue and, because it has not been sufficiently raised here, we do not address it.") (footnote omitted). The issue thus remains open in the Seventh Circuit.

Petitioner also asserts (Pet. 15-16) that the decision below conflicts with the approach taken by the Third Circuit in *United States* v. *Terlingo*, 327 F.3d 216 (2003). That is incorrect. In *Terlingo*, the court of appeals applied equitable-tolling principles to extend the 90-day limit where the defendants were partially responsible

for the delay in awarding restitution. *Id.* at 219-223. *Terlingo* does not conflict with the decision below because it did not hold that Section 3664(d)(5) is a jurisdictional provision. Nor does *Terlingo* reject—or even address—the harmless-error approach taken in other circuits. And *Terlingo* cannot be viewed as an implicit rejection of harmless-error analysis, since both equitable tolling and harmless error may properly be applied to the same statute.[5]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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NOVEMBER 2009

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[5] Indeed, as petitioner recognizes, the Second Circuit has done exactly that. Compare Pet. 14-15 (citing *United States* v. *Stevens*, 211 F.3d 1 (2000) (tolling), cert. denied, 531 U.S. 1101 (2001)), with Pet. 16 (citing *United States* v. *Zakhary*, *supra* (harmless error)).

REPLY BRIEF

Supreme Court, U.S.
FILED
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No. 09-367

IN THE

Supreme Court of the United States

BRIAN RUSSELL DOLAN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Tenth Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

The question presented here is "[w]hether a district court may enter a restitution order beyond the time limit prescribed in 18 U.S.C. § 3664(d)(5)." Pet. i. Resolution of this case thus turns on two issues: (1) whether it violates the statute to impose a restitution order beyond the time limit; and (2) if so, whether such an error can be deemed harmless on appeal. In contrast to every other circuit that has addressed the first issue, the Tenth Circuit held in this case that the Mandatory Victims Restitution Act ("the Act" or "the MVRA") sets *no* enforceable time limit on a district court's power to award restitution. Adopting a "better-late-than-never principle," Pet. App. 13a, the court of appeals held that "notwithstanding any missed deadline, restitution must be awarded," Pet. App. 10a. Petitioner has already explained why the Tenth Circuit's decision is wrong. *See* Pet. 25-32.

The Government does not attempt to defend the Tenth Circuit's novel construction of the Act, a provision that governs federal courts in more than ten thousand proceedings each year. *See* Pet. 23. Instead, faced with an undeniable conflict among the courts of appeals and an indefensible ruling below on the merits, the Government offers three responses. First, it suggests that this case raises only the second issue – whether a violation of the Act can be deemed harmless – and argues that this case is "not an appropriate vehicle for considering" that issue. BIO 6. Second, it tries to downplay the magnitude of the conflict over the question presented, offering an unsupported hope that the preexisting and

longstanding split that the decision below exacerbates will somehow resolve itself without this Court's intervention. Third, it argues on the merits that violations of Section 3664(d)(5) can be deemed harmless on appeal. None of these arguments withstands scrutiny.

1. The Government's vehicle argument depends entirely on semantics. The Government points to places in petitioner's appellate brief where he used the words "jurisdiction" and "jurisdictional" to describe his arguments to claim that petitioner "failed to raise . . . below" the question on which he seeks certiorari. BIO 6.

The Government is wrong. Its references to the record below are highly, and misleadingly, selective. Petitioner's initial submission to the district court regarding Section 3664(d)(5) "request[ed] the court to find the statutory period in which restitution can be ordered has expired." Restitution Memorandum [Doc. No. 47] at 1 (Feb. 14, 2008). That memorandum never once used the word "jurisdictional" to describe petitioner's argument.[1]

The district court understood precisely the scope of petitioner's claim. It explained that although petitioner "admit[ed] that Section 3664(d)(5) is not an expressly jurisdictional statute," he contended that the district court "no longer ha[d] power to order"

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[1] The only time the word appears in petitioner's memorandum is within a quotation from the Sixth Circuit's opinion in *United States* v. *Vandeberg*, 201 F.3d 805, 814 (6th Cir. 2000), a case on which he did not rely. *See also* Pet. 17-18.

restitution. Pet. App. 41a.[2] Thus, when the district court announced that it "retain[ed] jurisdiction," Pet. App. 41a, 45a, 48a, it was holding simply that it continued to enjoy the power to order restitution even though the ninety-day period established by Section 3664(d)(5) had expired.

In the court of appeals, petitioner and the Tenth Circuit did sometimes use the words "jurisdiction" and "jurisdictional." But they used the words "jurisdiction," "authority," and "power" interchangeably to refer to "a court's power to decide a case or issue a decree." Black's Law Dictionary 927 (9th ed. 2009) (giving this definition of "jurisdiction"). For example, on the first page of its opinion, the court of appeals described petitioner's argument this way: "[Petitioner] contends that the district court's restitution order is void because it was entered too late, after a statutory deadline passed." Pet. App. 5a. When it later observed that "Dolan argues that the 90-day deadline set by § 3664(d)(5) is jurisdictional," it continued, in the very next sentence: "Put differently, he thinks the district court's power to enter any restitution order expired 90 days after his sentencing on July 30, 2007." Pet. App. 9a (emphasis omitted). *Compare also, e.g.*, Pet. C.A. Br. 11, 12, 13

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[2] This is the same point that petitioner made here. *See* Pet. 29 (explaining that while "Section 3664(d)(5) is not 'jurisdictional'" in the more limited sense adopted by this Court in *Kontrick v. Ryan*, 540 U.S. 443 (2004), "a rule need not be 'jurisdictional' in this sense to constitute 'an inflexible claim-processing rule'" (quoting *id.* at 456)). So it is somewhat puzzling that the Government acts as if petitioner has shifted ground. BIO 6.

(using the word "authority") *with id.* at 1, 9-10, 24 (using the word "jurisdiction").

At most, petitioner and the courts below may "have been less than meticulous" when they "used the term 'jurisdictional' to describe emphatic time prescriptions." *Kontrick v. Ryan*, 540 U.S. 443, 454 (2004) (noting that other courts, "including this Court," have "more than occasionally" done the same). Petitioner and the lower courts "used the word 'jurisdiction' 'as a shorthand' to indicate a nonextendable time limit." *Id.* But while that distinction mattered in *Kontrick*, where the question was whether a limit applied despite a party's procedural default, here it does not. Petitioner properly invoked the time limit in Section 3664(d)(5) both before the district court and in the court of appeals, and the Government does not contend otherwise.

In short, petitioner asks this Court to review the same question he raised before the district court and the court of appeals: Whether a district court has the power to enter a restitution order after the time limit prescribed in Section 3664(d)(5) has expired. There are no obstacles to this Court reaching, and deciding, that question.

2. The Government claims that petitioner has "exaggerate[d] the magnitude of the split in authorities." BIO 11. That, too, is incorrect, and the Government's argument rests largely on its truncating of the question presented to include only the second issue.

a. The Government never addresses the central point in the petition: the Tenth Circuit held, in

conflict with the approaches taken by the Second, Third, Sixth, Seventh, Eighth, Ninth, and Eleventh Circuits, that the district court in this case *properly* issued a restitution order despite the fact that the ninety-day time limit established by Section 3664(d)(5) had "undoubtedly" expired. Pet. App. 5a. Put simply, the Tenth Circuit held that there was no error in the first place.

As the petition points out, the Seventh and Eleventh Circuits have squarely held that a district court "exceed[s] its authority in ordering restitution" outside the time limits set by Section 3664(d)(5). *United States v. Farr*, 419 F.3d 621, 623 (7th Cir. 2005);[3] *see also United States v. Maung*, 267 F.3d 1113 (11th Cir. 2001); Pet. 11-14. The Eighth Circuit similarly observed, in *United States v. Balentine*, 569 F.3d 801, 805 (8th Cir.), *pet. for cert. pending*, No. 09-6760 (filed Sept. 28, 2009), that "Section 3664(d)(5) unambiguously imposes a 90-day time limit on restitution orders." *See* Pet. 26 (discussing *Balentine*). And the Sixth Circuit, although its cases point in several directions, has held that once the "statutory deadline" has expired, a district court that has failed to enter any restitution order cannot, "consistent with the terms of the statute, set an

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[3] The Government tries to exclude the Seventh Circuit from the mix by emphasizing that *Farr* "declined to address whether the harmless-error standard should be applied to Section 3664(d)(5)." BIO 11. True, but entirely beside the point with respect to the question whether the MVRA authorizes district courts to enter untimely orders. As to that question, *Farr* is unambiguous: district courts lack that power.

amount of restitution." *United States v. Jolivette*, 257 F.3d 581, 583-84 (6th Cir. 2001); *see also United States v. Bogart*, 576 F.3d 565, 573 (6th Cir. 2009) (referring to the district court's "error in failing to comply with § 3664(d)(5)"). *See* Pet. 17-20 (discussing the Sixth Circuit cases).

The Second, Third, and Ninth Circuits have not explicitly held that district courts lack the power to impose restitution orders once the ninety-day time limit of Section 3664(d)(5) has expired. But that conclusion is implicit in their holdings regarding tolling and harmless error review. *See* Pet. 14-17 (discussing these courts' decisions). It makes little sense to devote substantial attention, as each of these circuits has done, to whether a time limit should be tolled if the time limit is not binding in the first place. Nor would it be necessary to determine whether a district court's failure to comply with the ninety-day time limit was *harmless* error unless it was error in the first place.

The key point is this: in each of the other circuits, the rule that a *district court* should apply is clear. In those circuits, once the ninety-day time limit set by Section 3664(d)(5) has expired,[4] the district court loses its statutory authorization to order restitution

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[4] To be clear, in at least some circuits, the ninety-day limit can be tolled. *See* Pet. 14-16 (describing the Second and Third Circuits' divergent tolling rules); *see also* BIO 11 (suggesting the Eleventh Circuit might be amenable to tolling in appropriate cases). But tolling principles go solely to the question of how to calculate the ninety-day period, and not to whether the MVRA sets a time limit on the district court's power.

and commits legal error by imposing an untimely restitution order. *See also* Pet. 25-32 (explaining why district courts lack the power to order restitution outside of the time limits set by the MVRA). By contrast, the Tenth Circuit's rule holds exactly the opposite: district courts must impose restitution even when the time limit has run.

b. Rather than contesting, or even addressing, that point, the Government looks instead only at the subsequent issue: *If* a district court has acted in violation of Section 3664(d)(5), what should the court of appeals do?[5]

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[5] Only this latter issue was even presented by the petition in *Dupre v. United States*, 129 S. Ct. 2158 (2009) (No. 08-8080), on which the Government relies here, BIO 5. *See* Pet. for Cert. i, *Dupre*. And *Dupre* suffered from procedural complications not present in this case. The restitution order there was concededly issued within ninety days after the defendant's resentencing following a successful appeal on another issue. *See* Br. in Opp. 6-7, *Dupre*. The defendant there agreed that she owed $967,374.82, in restitution, Pet. for Cert. 4, *Dupre*, because she had initially agreed to that amount years earlier, and the question before this Court was only whether harmless error analysis should apply to the district court's imposition of a higher amount. *See* Br. in Opp. 15, *Dupre* (noting that, unlike petitioner in this case, Dupre "has never argued that no restitution award can be entered against her at all"). Even as to that question, in light of *Dupre*'s tangled procedural history, the Government noted that it was arguable that "the question of harmless-error review is not presented here at all, because the district court did not err." *Id.* at 14. By contrast, the Government never contests in this case that the district court erred.

But the courts of appeals are divided over that issue too. They range from courts that refuse to import a prejudice requirement to courts that apply harmless error analysis to the Tenth Circuit in this case, which suggested that Section 3664(d)(5) errors should *never* be reversed.

Indeed, the Government acknowledges the presence of this split and the continuing uncertainty over how to apply the MVRA. As it concedes, the Eleventh Circuit has squarely refused to apply harmless-error analysis to Section 3664(d)(5) violations. *See* Pet. 16. The Government responds with a vague suggestion that the Eleventh Circuit might change its mind "[i]n an appropriate case." BIO 11. What the Government leaves unsaid is that such cases are not likely to arise. *Maung* has been adhered to repeatedly in the Eleventh Circuit. *See* Pet. 14. If district courts follow *Maung*, then they will not impose untimely restitution orders, and defendants will have no occasion for appeal.

Nor does the Government provide any reason to believe that it will appeal. To the contrary, the Government has apparently declined to challenge *Maung*. *See* Amended Response of the United States to this Court's Jurisdictional Question at 3, *United States v. Kapelushnik*, 306 F.3d 1090 (11th Cir. 2002) (No. 01-14114-EE/01-14115-EE) (Oct. 4, 2001) (conceding that no restitution order could be imposed in that case in light of *Maung*'s holding that Section 3664(d)(5) "required that restitution orders be included in judgments within 90 days of the entry of judgment, failing which that provision of the sentence will have been deemed waived"). And because the Government declines to argue that

district courts can order restitution beyond the time limit prescribed in Section 3664(d)(5), it is hard to imagine on what grounds it would appeal a district court's refusal to impose an untimely order. It would be bizarre, to say the least, for the Government to file an appeal that acknowledges that the district court committed no error in refusing to require restitution, but asks the court of appeals nonetheless to direct the district court to err by issuing an untimely order and, once the district court errs, to hold that the error will be subject to harmless-error review.

Nor, despite a decade's worth of litigation, have the other circuits adopted a consistent standard for reviewing district court errors. The Eighth Circuit, for example, has rejected the requirement that a defendant prove prejudice, *see Balentine*, 569 F.3d at 805, although it apparently will uphold untimely restitution orders under its own novel theory. *See* Pet. 20. Several circuits have declined to address the question or have only addressed the distinct question of what to do in cases where the defendant has failed to object properly to the order. *See* Pet. 22. And the Tenth Circuit in this case suggested that, far from Section 3664(d)(5) errors being subject to harmless-error review, as the Government suggests here, *see* BIO 7-9, such errors (if they even exist, *see supra* at 5-8, describing the conflict between the Tenth Circuit and other circuits on this issue) should be affirmed without respect to prejudice. *See* Pet. 22-23; Pet. App. 20a-21a. The fact that the Tenth and Eighth Circuits have adopted novel positions this year shows that the circuit conflict will not resolve itself without this Court's intervention.

3. On the merits, the Eleventh Circuit has correctly concluded that Section 3664(d)(5) contains no prejudice requirement. *See Maung*, 267 F.3d 1121-22. Beyond pointing to the fact that three courts have applied harmless-error analysis to Section 3664(d)(5) violations,[6] the Government cites not a single example of a statutory time limit governing *criminal* trials or sentencing that has been subjected to harmless-error analysis. That is hardly surprising, given the longstanding treatment of such provisions. As this Court explained in *United States v. Marion*, 404 U.S. 307, 322 (1971), statutes of limitations "specif[y] a limit beyond which there is an irrebuttable presumption" of prejudice. The same is true for Speedy Trial Act violations. For example, in *Zedner v. United States*, 547 U.S. 489, 509 (2006), this Court stated that "harmless error review is not appropriate" in such cases.[7] If a defendant properly

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[6] None of those decisions cited Fed. R. Crim. 52(a), on which the Government relies here. The Government also inaccurately includes in its list cases where courts of appeals have affirmed on other grounds, such as *United States v. Cheal*, 389 F.3d 35 (1st Cir. 2004) (employing plain-error review in a case where the defendant did not properly object), have found remedies categorically unavailable regardless of prejudice, *Balentine*, or have spoken only in dicta, *United States v. Johnson*, 400 F.3d 187 (4th Cir.) (interpreting a different aspect of Section 3664(d)(5)), *cert. denied*, 546 U.S. 856 (2005).

[7] To be sure, if the reversal of the defendant's conviction nonetheless permits dismissal of the indictment without prejudice, the Government will have the option of seeking a new indictment. But that ability is distinct from the question whether the conviction obtained after an erroneous refusal to dismiss on Speedy Trial Act grounds must be reversed.

objects to an untimely prosecution, his conviction will be reversed without regard to whether he can show prejudice.

The same rule should apply to an untimely sentencing that violates a clear statutory command. "[T]he fact that a time limitation is set forth in a statute" matters. *Bowles v. Russell*, 551 U.S. 205, 210 (2007). Where a court could not properly have imposed a sentence at all, a defendant's "substantial rights" *have* been "affected" by the error. Fed. R. Crim. P. 52(a). The assumption underlying Rule 52(a) is that reviewing courts will determine whether the defendant would have been convicted or would have received the same sentence even if the district court had not erred. With respect to trial errors, that inquiry is relatively straightforward, and can often be answered in the affirmative. But in cases involving violations of straightforward statutory time limits, the answer is inherently negative. At the time the district court in this case issued its restitution order, it lacked statutory authority under Section 3664(d)(5) because the ninety-day period had expired. *Only* its error permitted imposition of an obligation that petitioner pay $104,649.78 as part of his sentence.[8] The district court's error in this case thus affected petitioner's substantial rights. *Cf. United States v. Keigue*, 318 U.S. 437, 445 (2d Cir. 2003) (stating that, even in plain-error cases, "a defendant's substantial

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[8] It is irrelevant that the court could properly have ordered restitution earlier just as it would be irrelevant once a statute of limitations had run that the government could have prosecuted the defendant during the limitations period.

rights have been affected" when it is shown that he "*would* have received a different," less onerous sentence "absent the . . . error").

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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JOINT APPENDIX

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JOINT APPENDIX

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I

U.S. DISTRICT COURT
DISTRICT OF NEW MEXICO
VERSION 3.2.3 (LAS CRUCES)
CRIMINAL DOCKET
FOR CASE #: 2:06-cr-02173-RB-1

RELEVANT DOCKET ENTRIES

Date Filed	#	Docket Text
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10/13/2006	10	INDICTMENT by USA Presiliano Torrez. Counts filed against Brian Dolan (1) count(s) 1 (mk) (Entered: 10/13/2006)
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07/28/2008	79	JUDGMENT as to Brian Dolan by District Judge Robert C. Brack (rg) (Entered: 07/29/2008)
08/04/2008	81	TRANSCRIPT of Felony Plea Proceedings as to Brian Dolan held on February 8, 2007, before Judge Lourdes Martinez. PLEASE TAKE NOTICE that each party now has seven (7) calendar days to file a Notice of Intent to Request Redaction of any personal identifiers from this transcript. If no notice is filed during this seven-day period, the court will assume that redaction of personal data is not necessary and will make the transcript electronically available, as is, to the public after 90 days. For additional guidance, PLEASE REVIEW the complete policy, located in the CM/ECF Administrative Procedures Manual at www.nmcourt.fed.us. Transcripts may be

		purchased from the court reporter and/or viewed (but not copied) at the Clerk's Office public terminal within the 90-day period. Notice of Intent to Request Redaction set for 8/18/2008 Redaction Request due 8/25/2008. Redacted Transcrip' Deadline set for 9/4/2008. Release of Transcript Restriction set for 11/3/2008.(pg) (Entered: 08/04/2008)
03/12/2009	88	Clerk's Minutes for proceedings held before Magistrate Judge Lourdes A. Martinez: Initial Appearance re Revocation of Supervised Release as to Brian Dolan held on 3/12/2009; show cause/detention hearing to be set; deft in custody; (FTR LCS) (yc) (Entered: 03/12/2009)
03/13/2009	89	NOTICE OF HEARING as to Brian Dolan Show Cause/Detention Hearing set for 3/16/2009 09:30 AM in Las Cruces - Judge Lourdes A. Martinez Courtroom before Magistrate Judge William P

		Lynch. [*Interpreter Needed*](yc) [THIS IS A TEXT-ONLY ENTRY. THERE ARE NO DOCUMENTS ATTACHED.] (Entered: 03/13/2009)
04/27/2009	96	Clerk's Minutes for proceedings held before District Judge Robert C. Brack: Final Hearing re Revocation of Supervised Release as to Brian Dolan held on 4/27/2009; Defendant admits to violations 1 and 2; SENTENCE IMPOSED: CBOP- 6 months; Supervised Release: 2 years with Special Conditions, defendant in custody (Court Reporter V. Arrieta) (rg) (Entered: 04/27/2009)
04/27/2009	97	JUDGMENT ON PROBATION REVOCATION AND/OR SUPERVISED RELEASE as to Brian Dolan by District Judge Robert C. Brack (rg) (Entered: 04/27/2009)

COURT OF APPEALS DOCKET # 08-2104
UNITED STATES V. DOLAN

APPEAL FROM:
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

RELEVANT DOCKET ENTRIES

Date Filed	#	Docket Text
05/08/2008	[9568501]	Docketing statement filed by Mr. Brian Russell Dolan. Original and 4 copies. Served on 05/07/2008. Manner of Service: US mail, email.
07/02/2008	[9580217]	Appellant's motion filed by Mr. Brian Russell Dolan to extend time to file appellant's brief until 09/15/2008. Served on 07/02/2008. Manner of Service: email.
07/02/2008	[9580243]	Order filed by Clerk of the Court granting Appellant's motion to extend time to file apet brief. Appellant's brief due on 08/29/2008 for Brian Russell Dolan. Served on 07/02/2008.
07/18/2008	[9583573]	Order filed by Clerk of the Court granting, in part, appellant's motion to

		supplement the record on appeal. The district court clerk is requested to supplement the record on appeal with a transcript of the 2/8/07 plea hearing within 10 days of its completion. Served on 07/18/2008.
08/12/2008	[9589005]	Supplemental record on appeal filed. No. of Volumes: 1. Comments: Supplemental Volume 1-transcript of plea hearing.
08/28/2008	[9593352]	Appellant's brief filed by Mr. Brian Russell Dolan. Original and 7 copies. Served on 08/28/2008 by US mail, email. Oral argument requested? y. Appellee's brief due 10/02/2008 for United States of America.
09/02/2008	[9593636]	Appellee's unopposed motion for extension of time to file response brief until 11/03/2008 filed by United States of America. Served on 09/02/2008. Manner of Service: email.
09/02/2008	[9593660]	Order filed by Clerk of the Court granting appellee's motion for extension of time

		to file answer brief to 11/03/2008 (30-day extension) for United States of America. No further extensions on the clerk's authority. Served on 09/02/2008.
11/03/2008	[9610345]	Appellee's answer brief filed by United States of America. Original and 7 copies. Served on: 11/03/2008. Manner of service: email. Oral argument requested? n. Appellant's reply brief due 11/20/2008 by Brian Russell Dolan.
11/05/2008	[9610097]	Appellant's unopposed motion filed by Mr. Brian Russell Dolan for extension of time to file reply brief until 12/01/2008. Served on 11/05/2008. Manner of Service: US mail, email.
11/06/2008	[9610358]	Order filed by Clerk of the Court granting appellant's unopposed motion for extension of time to file reply brief for 14 days to 12/04/2008 by Brian Russell Dolan. No further extensions on the clerk's authority. Served on 11/06/2008.

11/17/2008	[9612604]	Calendar notice sent to counsel. Arguments to be held Friday, January 16, 2009 at 8:30 a.m. MST in Courtroom III of the Byron White United States Courthouse, Denver, CO. Counsel is required to go to http://www.ca10.uscourts.gov under the argument calendar tab to obtain an important notice regarding calendared cases and required forms that must be completed and returned to the clerk's office within 10 days.
12/04/2008	[9617207]	Appellant's reply brief filed by Mr. Brian Russell Dolan. Original and 7 copies. Served on 12/04/2008. Manner of Service: US mail, email.
01/16/2009	[9626845]	Case argued by Sara Sanchez, for appellant and by Terri Abernathy, for appellee; Submitted to Judges Murphy, Anderson and Gorsuch.
05/27/2009	[9662099]	Affirmed; Terminated on the merits after oral hearing; Written, signed, published; Judges Murphy, Anderson

		and Gorsuch, authoring judge. Mandate to issue.— [Edited 06/26/2009 by KLP to delete the published opinion attachment per the court's order of 6/26/09 granting petition for rehearing and issuing a corrected opinion.]
05/27/2009	[9662103]	Judgment for opinion filed.
05/27/2009	[9670789]	Affirmed; Terminated on the merits after submissions without oral hearing; Written, signed, published; Judges Murphy, Anderson and Gorsuch, author. Mandate to issue.
06/10/2009	[9666399]	Petition for rehearing en banc filed by Mr. Brian Russell Dolan. Original and 18 copies. Served on 06/10/2009. Manner of Service: US mail.
06/26/2009	[9670722]	Order filed by Judges Murphy, Anderson and Gorsuch granting sua sponte petition for rehearing for the limited purpose of adding a footnote to the end of section II, page 19; denying petition for rehearing en banc.

06/26/2009	[9670726]	Order filed by Clerk of the Court reopening appeal. (This is a text-only entry. No attachment.)
07/06/2009	[9672814]	Mandate issued.
10/02/2009	[9698650]	Petition for writ of certiorari filed by Brian Russell Dolan on 09/23/2009. Supreme Court Number 09-367.

FILED
UNITED STATES DISTRICT COURT
LAS CRUCES, NEW MEXICO
FEB 08 2007
MATTHEW J. DYKMAN
CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

UNITED STATES OF AMERICA, Plaintiff,	)	
v.	)	Criminal No. 06-2173RB
BRIAN RUSSELL DOLAN, Defendant.	)	

PLEA AGREEMENT

Pursuant to Rule 11, Fed. R. Crim. P., the parties notify the Court of the following agreement between the United States Attorney for the District of New Mexico, the Defendant, Brian Dolan, and the Defendant's counsel, Jess Lilley:

REPRESENTATION BY COUNSEL

1. The Defendant understands the Defendant's right to be represented by an attorney and is so represented. The Defendant has thoroughly reviewed all aspects of this case with the Defendant's attorney and is fully satisfied with that attorney's legal representation.

RIGHTS OF THE DEFENDANT

2. The Defendant further understands the Defendant's rights:

a. to plead not guilty, or having already so pleaded, to persist in that plea;

b. to have a trial by jury; and

c. at a trial:

1) to confront and cross-examine adverse witnesses,

2) to be protected from compelled self-incrimination,

3) to testify and present evidence on the Defendant's own behalf, and

4) to compel the attendance of witnesses for the defense.

WAIVER OF RIGHTS AND PLEA OF GUILTY

3. The Defendant agrees to waive these rights and to plead guilty to Count I of the indictment, charging violation of 18 U.S.C. §113(a)(6), that being assault resulting in serious bodily injury.

SENTENCING

4. The Defendant understands that the minimum and maximum penalty the Court can impose is:

a. imprisonment for a period of up to ten (10) years;

b. a fine not to exceed $250,000;

c. a term of supervised release of not more than three years that must follow any term of

imprisonment. (If the Defendant serves a term of imprisonment, is then released on supervised release, and violates the terms of supervised release, the Defendant's supervised release could be revoked – even on the last day of the term – and the Defendant could then be returned to another period of incarceration and a new term of supervised release.);

d. a mandatory special penalty assessment of $100; and

e. restitution as may be ordered by the Court.

* * * * *

PLEA MINUTE SHEET IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO (AT LAS CRUCES)			
CR 06-2173 RB	**UNITED STATES vs. DOLAN**		
Before the Honorable Lourdes A. Martinez, United States Magistrate Judge			
Hearing Date:	02/08/07	Time In and Out:	1:43-1:48PM/3:00-3:20PM (21 MIN.)
Clerk:	ELVIA GARCIA	FTR Information	FTR/KBM
Defendant	BRIAN RUSSELL DOLAN	Defendant & Counsel	JESS LILLEY
AUSA	MARK D ANTONIO	Interpreter:	NONE · Sworn

X	Defendant Sworn		First Appearance
X	Consent to proceed before a magistrate judge and original plea agreement reviewed and executed by Deft.		
X	Deft acknowledges receipt of: (Indictment)		
	If Deft proceeding by way of Information, Deft acknowledges right to an Indictment and waives that right		
X	Terms and conditions of proposed plea agreement explained		
X	Factual predicate to sustain the plea provided		
X	Deft questioned re Deft's age, education, physical/mental condition, and whether under the influence of alcohol, drugs, or any medication. Deft advised of charge(s), penalties and possible		

	consequences of the plea		
X	Deft advised of constitutional rights, loss of rights, and maximum possible penalties: 10 yrs. Imprisonment; $250,000.00 fine; 3 yrs. supervised release; $100.00 SPA; no restitution; and any forfeitures		
X	Deft questioned re time to consult with attorney and if satisfied with his or her representation		
X	Court finds Deft fully understands charge(s), terms of plea, and the consequences of entry into plea agreement		
X	Deft plead GUILTY to: INDICTMENT		
X	Allocution by Deft on elements of charge(s)		
X	Court finds plea freely, voluntarily, and intelligently made; plea of guilty accepted		
X	Deft adjudged guilty		
X	Acceptance of plea agreement deferred until final disposition hearing by District Judge		
X	Sentencing Date: WITHIN 75 DAYS		
X	Defendant to Remain in Custody		
	Present conditions of release continued		Conditions changed to:
	Penalty for failure to appear explained		
X	Presentence Report Ordered		**Expedited (Type III)**
	Other Matters:		

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO

UNITED STATES OF AMERICA vs, BRIAN RUSSELL DOLAN	PRESENTENCE INVESTIGATIVE REPORT – TYPE I Case No. 2:06CR02173-001RB

Prepared For:	Honorable Robert C. Brack United States District Judge	**Sentence Date:** Open
Prepared By:	Donna C. Jaime/cs United States Probation Officer 200 E. Griggs Las Cruces, New Mexico 88001 (505) 528-1568	**Sentencing Location:** Las Cruces, New Mexico
	Assistant U.S. Attorney Presiliano Torrez P.O. Box 607 Albuquerque, New Mexico 88011 (505) 346-7274	**Defense Counsel:** Jess Lilley (appointed) 1014 S. Main Street Las Cruces, New Mexico 88005 (505) 524-7809

Date of Plea: February 8, 2007

Offense: Indictment: Crime in Indian Country: Assault Resulting in Serious Bodily Injury, 18 U.S.C. § 1153, 18 U.S.C. § 113(a)(6); 10 years imprisonment, $250,000 fine, 3 years TSR; $100 SPA, a Class C Felony

Mandatory Minimum: None

Date of Arrest: September 21, 2006

Custodial Status: In federal custory since date of arrest (313 days custody through April 30, 2007)

Detainers: None

[Various Personal Information Redacted]

Disclosure Date: April 11, 2007

Redisclosure Date: May 30, 2007

* * * * *

The Offense Conduct

5. The following information was obtained from investigative reports prepared by the Bureau of Indian Affairs (BIA), as contained in the United States Attorney's file.

6. On September 9, 2006, at approximately 6:00 P.M., a Bureau of Indian Affairs (BIA) police officer responded to a complaint of a man lying on the side of the road, bleeding and unconscious. Upon arriving at the scene, the officer made contact with the reporting party identified as Tony Mendez. Mr. Mendez stated he was traveling from work at the Inn Mountain Gods Casino to his residence when he observed the victim, later identified as Evan Ray Tissnolthtos,

lying on the side of the road covered in blood. Mr. Tissnolthtos was treated at the scene for a broken wrist, severe face and head injuries. After being stabilized he was transported by medical helicopter to Thomason Hospital in El Paso, Texas.

7. On September 9, 2006, at approximate 6:30 P.M., Deanna Dolan called the BIA police dispatch and advised that her brother, **Brian Russell Dolan**, stated he had assaulted someone. The BIA officer responded and interviewed Ms. Dolan and Nicole Dolan, who reported her brother, **Brian Russell Dolan**, told her he physically assaulted someone really bad and had left him on the side of the road. BIA officers located the crime scene by following Mr. Tissnolthtos shoe prints on a gravel side road near the location he was found. They observed blood, matted grass, and tire tracks going in and out of the scene. The tire size found indicated the suspect was driving a small vehicle.

8. On September 10, 2006, **Mr. Brian Russell Dolan** was arrested by a BIA officer at a residence in Pena housing. The officer observed blood stains on **Mr. Dolan's** clothing, which was seized as evidence. The officer located **Mr. Dolan's** vehicle and noticed the tire tread, which when comparing size and distance apart, matched those left at the assault scene. Additionally, the officer observed dried blood on the inside passenger side door panel. The vehicle was impounded as evidence.

9. On September 11, 2006, **Mr. Dolan** was interviewed by a BIA officer after he agreed to waive his right to have an attorney present. **Mr. Dolan** stated he was driving his vehicle, a Kia Sephia, from Pena housing to White Mountain housing, when he

saw the victim, Evan Tissnolthtos walking and gave him a ride. While in the vehicle, Mr. Tissnolthtos demanded a ride to Ruidoso, New Mexico, at which time an argument ensued. **Mr. Dolan** pulled the vehicle over on the gravel road, the crime scene, and they began fighting. **Mr. Dolan** stated he struck Mr. Tissnolthtos with his fists numerous times in the face and on his body. The fight went to the ground where they continued to fight until Mr. Tissnolthtos was incapacitated. **Mr. Dolan** was not able to recall if he kicked Mr. Tissnolthtos or not. He further stated he was very intoxicated. **Mr. Dolan** then left the area and further stated that he observed Mr. Tissnolthtos get up as he was driving away.

10. On September 11, 2006, Mr. Tissnolthtos' sister, Marla Evan, called the BIA officer and advised that she was at the hospital. She stated Mr. Tissnolthtos was in critical condition and in and out of consciousness. She further stated that he suffered a broken nose, head injuries, broken ribs, and was on a machine to help him breathe.

11. Based on the aforementioned information gathered by the BIA investigators, an arrest warrant was issued for **Mr. Dolan** on September 19, 2006, and executed on September 21, 2006.

12. On September 27, 2006, a BIA Special Agent made contact with Mr. Tissnolthtos's at the parking lot of a McDonald's restaurant in Las Cruces, New Mexico. Mr. Tissnolthtos stated that on September 9, 2006, he recalls being at his sister's residence, Marla Evan, in Pena Housing. However, he does not recall being assaulted. The next thing he remembered was waking up in the hospital and being told that he had been assaulted. Mr. Tissnolthtos

further stated that he knows **Mr. Dolan** and had a previous incident with him. Reportedly, a few months ago, he and **Mr. Dolan** had been drinking at Marla Evan's residence, where **Mr. Dolan** consumed a large bottle of whiskey with a group. **Mr. Dolan** became belligerent and started a physical altercation with Mr. Tissnolthtos, who was able to stop **Mr. Dolan** from attacking him. At that time **Mr. Dolan** got into his vehicle and drove away.

13. According to Mr. Tissnolthtos, he later encountered **Mr. Dolan**, who seemed to be holding a grudge for what had previously happened. **Mr. Dolan** attempted to start another physical confrontation, however, he eventually dropped the matter and went on his way.

* * * * *

Victim Impact Statement

16. The Mandatory Victim Restitution Act of 1996 is applicable in this case. The Act requires the Court to enter a restitution order for each defendant who has been found to have committed a crime of violence, an offense against property, or a crime related to tampering with consumer products. The order must be entered without consideration of the defendant's ability to pay and without consideration of the costs of collection efforts to the Department of Justice.

* * * * *

21. When asked how this crime has affected him, the victim stated that he has been affected physically. Mr. Tissnolthtos reported he suffered a fractured nose, sinus fractures, a broken right wrist, a

fractured right leg, a spinal injury, broken ribs, and a hematoma in his head. Mr. Tissnolthtos related that he continues to suffer lingering effects from the injuries, such as headaches, blurred vision, numbness on the left side of his face, and described his physical condition as not being the same. In addition, he is often on pain medication and still needs another operation to further repair his nose fracture. Mr. Tissnolthtos also expressed that he will permanently have metal pins on the left side of his face. Mr. Tissnolthtos advised he has not acquired any medical costs because he has been told his medical expenses will be covered by Indian Health Services.

22. When asked how his family has been affected by this crime, he reported not knowing how this crime has affected his family. He did indicate that his family was very upset due to the severity of his injuries and that his family feared he would not survive.

23. When asked how this crime affected his ability to work, the victim reported he has been unemployed since the assault. The victim described his occupation as a laborer, working mostly in maintenance. As a result of his injuries, the victim feels he is physically weaker and fears not being able to perform the required job duties. The victim did disclose he will begin working on April 9, 2007, with Inn of the Mountain Gods in Ruidoso, New Mexico, with the maintenance department. The victim reports that the time of his assault he was employed and he further calculated his lost wages of $7,000. The victim was unable to provide a check stub or a letter from his employer at the time of the interview, however, he stated he would make an attempt to

obtain documentation. Upon receiving the information, it will be forwarded to the Court.

* * * * *

Restitution

101. The Mandatory Victim Restitution Act of 1996 is applicable to this case. The Act requires the Court to enter a restitution order for each defendant who has been found to have committed: a crime of violence, an offense against property, or a crime related to tampering with consumer products. The order must be entered without consideration of the defendant's ability to pay and without consideration of the costs and collection efforts to the Department of Justice. The manner in which restitution is collected will be in accordance with 18 U.S.C. § 3572.

102. According to the victim in this case, Evan Tissnolthtos, he requested restitution for lost wages in the amount of $7,000. However, he was unable to provide documentation of his employment and wage at this time. Therefore, at this time his request cannot be ordered. Additionally, the victim has not accrued any medical expenses and has been told that all hospital costs will be covered by Indian Health Services. A number of letters have been submitted and telephone calls have been made to IHS asking that information reference costs incurred by the victim or agencies for medical examinations be submitted to the United States Probation Office. As of the disclosure of the presentence report, no information has been received regarding possible restitution payments that may be owed. Upon receipt of said information, it will be forwarded to the Court for consideration.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	Criminal No. 06-2173 RB
v.	)	
BRIAN RUSSELL DOLAN,	)	
Defendant.	)	

UNITED STATES' MOTION TO CONTINUE SENTENCING

COMES NOW the United States by and through its counsel Larry Gomez, Acting United States Attorney for the District of New Mexico, and Presiliano Torrez, Assistant United States Attorney for said district, and moves the Court for an order continuing sentencing and as grounds states the following:

1. The defendant was indicted on October 13, 2006.

2. The defendant entered into a plea agreement on February 8, 2007.

3. The matter is set for sentencing on June 28, 2007.

4. The victim's sister has requested the opportunity to allocate at sentencing. The victim's sister will be unavailable on June 28, 2007.

5. Title 18, United States Code, Section 3771(a)(4) provides a victim's family members the opportunity to address the court at sentencing.

6. Defense is prepared to proceed to sentencing.

WHEREFORE, the United States respectfully requests that the Court enter an order continuing the matter for twenty one (21) days until July 19, 2007, or such other time as convenience for the court.

Respectfully submitted,

LARRY GOMEZ

Acting United States Attorney

PRESILIANO TORREZ
Assistant United States Attorney
Post Office Box 607
Albuquerque, New Mexico 87102
(505) 346-7274

I HEREBY CERTIFY that a true copy of the foregoing was mailed to opposing counsel of record:
Jess R. Lilley, Esq.,
1014 S. Main Street
Las Cruces, NM 88005
This 27th day of June, 2007.

/s/
PRESILIANO TORREZ
Assistant United States Attorney

FILED
UNITED STATES DISTRICT COURT
LAS CRUCES, NEW MEXICO
JUN 29 2007
MATTHEW J. DYKMAN
CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

UNITED STATES OF AMERICA, Plaintiff,	)	
v.	)	Criminal No. 06-2173RB
BRIAN RUSSELL DOLAN, Defendant.	)	

ORDER

THIS MATTER HAVING COME before the Court on the United States' Motion to Continue Sentencing, and the Court being fully advised in the premises, finds the motion is well taken.

IT IS THEREFORE ORDERED that the sentencing hearing currently set for June 28, 2007, be and hereby is vacated until [handwritten] to be set by the court.

[Signed] Robert Brack
UNITED STATES DISTRICT JUDGE

Submitted by:
/s/
Presiliano Torrez
Assistant United States Attorney

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	NO: CR 06-2173 RB
v.	)	
BRIAN DOLAN,	)	
Defendant.	)	

SENTENCING HEARING

Transcript of Proceedings before THE HONORABLE ROBERT C. BRACK, United States District Judge, held in the city of Las Cruces, Doña Ana County, New Mexico, commencing on Monday, July 30, 2007, at 10:10 A.M. and concluding at 10:36 A.M.

Appearances of Counsel:

For the United States:
Assistant United States Attorney
Renee L. Camacho, Esq.

For the Defendant:
Court-appointed Counsel
Jess Lilley, Esq.

Also Present: Sharon Vandever, U.S. Attorney's Office
Jamie McFarland, U.S. Probation Officer

[2] (In Open Court at 10:10 A.M.)

THE COURT: *United States of America versus Brian Dolan.* Mr. Dolan is present this morning, along with Mr. Lilley. Ms. Camacho on behalf of the Government. We're here for sentencing this morning. Mr. Lilley, I've read the report, as well as an addendum thereto—actually, two addendums from Probation, and your sentencing memo and—with its attachments, including letters from family members.

I don't have a response from the Government relating to the sentencing memo, Ms. Camacho. Was one filed?

MS. CAMACHO: I don't believe so, Your Honor. I'm covering this for Pres Torrez from Albuquerque. And I understand that the parties have basically agreed, under the presentence—or I'm sorry, the plea agreement, to a Guideline sentence. And we have no objection to the low end of that Guideline sentence, Your Honor.

THE COURT: All right.

Mr. Lilley, have you had a chance to review the report with your client?

MR. LILLEY: Yes, I have reviewed it, Judge.

THE COURT: And are there any additions, corrections, or objections, other than as noted?

* * * *

[8] [MR. LILLEY]: One thing, I think, is important here, Judge, is legally, this was a case where —you know, where I advised Mr. Dolan right

off that there's a very good likelihood that he goes to trial and he doesn't do any time, that he could be found not guilty, looking at this legally. That's what I try do. That's what I advised him. Other than this being a mutual fight and the injuries were severe and his admission that this was a mutual fight, I advised him—and I don't ever tell anyone what to do, but he certainly could have made the choice very easily that, *I want to go to trial.* He never took that. He always looked me in the eye and said, **[9]** *Look, I did something wrong. I'm going to fess up to it. Although it was a mutual fight, I didn't realize*— you know, both of these guys were intoxicated — I *didn't realize the damage was done.* There was also some evidence that the young man, Evan, might have been hit by a car. There was that type of a defense, that these injuries might have been inflicted by a car. He didn't want any part of that. And I respected him for that. And that, to me, shows that he has taken responsibility.

Again, he's been in jail for ten and a half months. I've seen some changes for the good. And hopefully, he continues. He's just got a couple of brief things, Judge.

THE COURT: Thank you. Mr. Dolan, let me hear from Ms. Camacho first, and then I'll hear from you.

MS. CAMACHO: Your Honor, the Court has read the Pretrial Services Report and, obviously, is aware of the extent of the injuries, which were extensive, and which is what led us here today. As I said, in the plea agreement, the defendant did accept his responsibilities. And the parties agreed basically not to ask for a variance from the Guideline range, which

is 21 to 27 months. And I would just ask the Court to impose a sentence within that range, Your Honor.

THE COURT: Thank you.

[10] Now, before I hear from Mr. Dolan, are there representatives of the victim's family that want to be heard?

MS. CAMACHO: Your Honor, there is a representative from the victim's family, but it's my understanding that nobody wishes to speak to the Court at this time.

THE COURT: Certainly, they have that right, if they'd like. I'd be glad to hear from them, but will respect their wish to remain silent if that's . . . .

MS. CAMACHO: And just for your information, Your Honor, we do have a victim witness advocate from the United States Attorney here with the victim's family. So they have somebody advising them, and they have chosen not to speak at this time.

THE COURT: Okay. Now, I recall, from reading the report last night, that there was some difficulty in communicating with the victim about restitution and about the extent of the injuries. And then finally, contact was made. And where are we now? Is the victim's advocate here as well?

MS. CAMACHO: Yes, Your Honor. This is Sharon Vandever with our office.

MS. VANDEVER: Good morning.

THE COURT: Yes, ma'am. Now, are we—do we [11] have a regular channel of communication with the victim and are we up to speed on restitution or no?

MS. VANDEVER: The agent was still trying to look for the victim, and I don't know—we're trying to work through his sister to see if we can locate him through his sister, but there is a bill of $80,000 that's still outstanding from the hospital. I'm not sure if Indian Health is going to cover that or not.

THE COURT: And did you say $80,000.

MS. VANDEVER: About $80,000. I don't know if you want to give 90 more days for restitution?

THE COURT: Well, I think the script anticipates that I'm just leaving the question of restitution open-ended because we don't have a good number at this point. And to the extent that I order restitution, obviously, we're going to have to work out some sort of a payment plan, whenever that happens. But thank you for your efforts.

And Mr. Dolan, let me hear from you.

THE DEFENDANT: I'd just like to say I'm sorry and I want to just move on and start a new life whenever I get a chance to. Thank you.

THE COURT: Mr. Dolan, this is, you know, a terrible situation that brings us here. A couple of men, probably both of you, intoxicated, fighting to the point that someone is injured to the extent that we've heard about [12] and read about. It's just more evidence of the fact that drugs and alcohol are a bane, they're a scourge on our age. And there is a particularly nasty pervasive problem with alcohol on the reservation.

And I read this report —and for those of you that don't know Mr. Dolan, the report says that he began drinking when he was 12, and experimentation with

other drugs, but even before the other drugs, inhalants, and then marijuana, then cocaine, then methamphetamine. And none of us should be surprised that Mr. Dolan hasn't made good decisions in the course of his young life. His decision-making process was flawed at a very early age when he began drinking, in a culture that sees that as just acceptable everyday conduct.

And I am sorry for the injuries sustained by the victim. Mr. Dolan has expressed his regret, and Mr. Dolan is paying a significant price for this mistake. The injuries were horrific, and we're sorry for those. But Mr. Dolan has paid with nearly a year of his life at this point and has several months left to go.

The good news is this, Mr. Dolan: But for this horrible thing having happened, you'd have probably been drinking every day from the time it happened until now. Nothing would have stopped you from that terrible downhill slide that you were on, and yet this intervened. You've **[13]** got, Mr. Lilley said, maybe the longest term of sobriety in your adult life as a result of this accident, this injury. And that's got to be good news. It's got to be good news for you and for your family, for your children, because you know what? But for something intervening, but for something stopping the day-to-day conduct that resulted in this, you'd have continued that way until you died at a young age or killed somebody on the highway, or maybe you're driving with — you have two girls, right?

THE DEFENDANT: Yes, sir.

THE COURT: Am I remembering that correctly? You're driving with them, and somebody gets hurt.

You were just a time bomb waiting to go off, and somebody was going to get hurt. Well, someone did. But as a result, you're clean and sober and you have a chance at sobriety for the rest of your life. I'm encouraged by your letter this morning. Thank you for your thoughts there. I'm encouraged by the obvious evidence of your taking advantage of this time, trying to use this time to a good result for you and your family. These courses will have a positive effect. And I would encourage you to stay with your studies, to stay with the courses that are available to you at the Bureau of Prisons.

THE DEFENDANT: I will.

THE COURT: But most of all, I want to encourage [14] you in your ongoing sobriety. You have had the last drink you ever need to have.

My dad was an alcoholic. And he lived until he was 80, but when he was 65, he was miraculously delivered from his alcoholism. He had been drinking every day up to that point and didn't drink any after that point. And I'm just telling you that story because I know it's possible. I've seen it in my own family situation. So I'm telling that to you and to those that are here, listening, there is hope for this problem. There is a way out of this problem that is so pervasive there. And I'm hoping that you can be the example of hope and recovery that's available for all those that suffer from alcoholism.

You said that you're going to be a good dad after this. You need to be. Little girls need a father. You're the only father that those girls will ever have and they need you. So I want you to be a positive influence in their lives. And it can start today. You

can communicate with them in letters. I know the little one can't understand those letters yet, but some day, she'll be able to. Use your time well, please. And I'll pronounce sentence at this time, but, again, my condolences to the family. I pray that those injuries sustained by Evan – I'll say "Evan" because I've got his—I may mispronounce his—Tissnolthos? I pray that his injuries are — he's recovered from them and [15] makes a full recovery and he can get on with a healthy, sober lifestyle himself.

I've reviewed the Presentence Report factual findings and considered the Sentencing Guideline applications and the 3553 factors. The Offense Level is 15. The Criminal History Category is II. The Guideline imprisonment range is 21 to 27 months.

I note that Mr. Dolan assaulted a male victim, causing him serious bodily injury. As to the Indictment, the defendant, Brian Russell Dolan, is committed to the custody of the Bureau of Prisons for a term of 21 months. I'll recommend that Mr. Dolan participate in the Bureau of Prisons' 500-hour drug and alcohol treatment program.

I'll make that recommendation, Counsel, but with the time remaining on his sentence, it's unlikely that he'll qualify for that program, I fear. But certainly, any programs that are available at the Bureau of Prisons, I'm going to recommend that he take advantage of those.

I'm going to place Mr. Dolan on supervised release for a term of three years. Mr. Dolan, you have to comply with the standard conditions of supervised release and the mandatory conditions, as well, including your submission to a DNA collection, in

compliance with statutory requirements, either at the Bureau of Prisons or later, at [16] the direction of the Probation office.

You're not to possess, have under your control, or have access to firearms, explosive devices, or other dangerous weapons. I want you to participate in and successfully complete any substance abuse treatment program that's recommended by the Probation Office. This is our ongoing effort to help you deal with the problem that you need help with. It will — there will be outpatient counseling and drug testing and even residential treatment, if necessary. You may be required to pay a portion of the cost of treatment.

I want you to refrain from the use and possession of alcohol, of course, and all other forms of intoxicants. I don't want you to even go into a place where alcohol is the primary item for sale.

I want you to participate in an educational or vocational program, as approved by the Probation Office, just by way of keeping up with what you've already shown yourself willing to do.

And then I want you to participate in and successfully complete any mental health treatment program that's recommended. That could include outpatient counseling, residential placement, or prescribed medication. You may be required to pay a portion of the cost of that treatment, as well.

[17] Pursuant to the mandatory restitution act, restitution is applicable. However, there is insufficient information on the record at this time regarding possible restitution payments that may be owed; therefore, I'm not going to order restitution at this time, but leave that matter open, pending the

receipt of additional information. And Mr. Dolan can anticipate that such an award will be made in the future.

Based on your lack of resources, I'm not going to impose a fine. The special penalty of $100 needs to be paid immediately.

And pursuant to the terms of the plea agreement, Mr. Dolan has waived his right to appeal the final sentence that I've just imposed.

Is there a request for designation?

MR. LILLEY: Yes, Judge. We would ask for either El Reno, Oklahoma, or Florence, Colorado, to be near family.

THE COURT: I'll make that recommendation, with the understanding that—Mr. Dolan, I hope you understand that it's just a recommendation. And with the short amount of time left on your sentence, it may or may not be followed.

Is there anything else?

MR. LILLEY: Nothing further, Judge. Thank you.

THE COURT: Thank you.

[18] Ms. Camacho?

MS. CAMACHO: No, Your Honor. May I be excused?

Mr. Martinez is in the hall. He's going to take over. I have to go down to Judge Garza.

THE COURT: Yes, ma'am. Thank you.

Mr. Dolan, God bless you.

(The proceedings concluded at 10:36 A.M.)

UNITED STATES DISTRICT COURT, DISTRICT OF NEW MEXICO

SENTENCING MINUTE SHEET

CR No.	06-2173 RB	USA vs.	DOLAN
Date:	7/30/07	Name of Deft:	BRIAN DOLAN

Before the Honorable	ROBERT C. BRACK		
Time In/Out:	10:01 A.M. – 10:33 A.M.	Total Time in Court (for JS10)	32 MINUTES
Clerk:	JESSICA CHAVEZ	Court Reporter:	VANESSA ARRIETA
AUSA:	RENEE CAMACHO	Defendant's Counsel:	JESS LILLEY
Sentencing in:	LAS CRUCES	Interpreter:	NONE
Probation Officer:	JAIME MCFARLAND	Sworn?	X Yes ___ No
Convicted on:	X Plea ___ Verdict	As to:	___ Information X Indictment
If Plea:	X Accepted ___ Not Accepted	Adjudged/Found Guilty on Counts:	COUNT 1
Date of Plea/Verdict:	2/8/07	PSR:	___ Not Disputed ___ Disputed
PSR: ___	Court Adopts PSR Findings	Evidentiary Hearing:	___ Not Needed ___ Needed
Exceptions to PSR:			

SENTENCE IMPOSED

Imprisonment (BOP): **21 MONTHS**

Supervised Release:	3 YEARS	Probation:		X	500-Hour Drug Program

SPECIAL CONDITIONS OF SUPERVISION

	No re-entry without legal authorization		Home confinement for months days
	Comply with ICE laws and regulations		Community service for months days
	ICE to begin removal immediately or during sentence		Reside halfway house for months days
X	Participate in substance abuse program/drug testing		Register as sex offender
X	Participate in mental health program		Participate in sex offender treatment program
X	No alcohol/liquor establishments		Possess no sexual material
	Submit to search of person/property		No computer with access to online services
	No contact with victim(s) and/or co-Deft(s)		No contact with children under 18 years
	No entering, or loitering near, victim's residence		No volunteering where children supervised
	Provide financial information		Restricted from occupation with access to children
	Grant limited waiver of confidentiality		No loitering within 100 feet of school yards
X	OTHER: Defendant must participate in an educational or vocational program as approved by the probation		

Fine: $		Restitution: $	None ordered at this time but leaves matter open upon receiving information			
SPA: $	WAIVED ($100 as to each Count)	Payment Schedule:		Due Immediately		Waived
OTHER:						
	Advised of Right to Appeal	X	Waived Appeal Rights per Plea Agreement			
X	Held in Custody		Voluntary Surrender			
X	Recommended place(s) of incarceration:	EL RENO OKLAHOMA OR FCI FLORENCE				
	Dismissed Counts:					
OTHER COMMENTS						

UNITED STATES DISTRICT COURT
District of New Mexico

UNITED STATES OF AMERICA v. **Brian Russell Dolan**	**Judgment in a Criminal Case** (For Offenses Committed On or After November 1, 1987) Case Number: 2:06CR02173-001RB USM Number: 72391-051 Defense Attorney: **Jess Lilley, Appointed**

THE DEFENDANT

X pleaded guilty to count(s) **Indictment**

☐ pleaded nolo contendere to count(s)

☐ after a plea of not guilty was found guilty on count(s)

The defendant is adjudicated guilty of these offenses:

Title and Section Nature of Offense	***Offense Ended***	***Count Number***
18 U.S.C. Sec. 113(a)(6) Assault Resulting in Serious Bodily Injury; Crime on an Indian Reservation, 18 U.S.C. Sec. 1153	09/09/2006	

The defendant is sentenced as specified in pages 2 through 5 of this judgment. The sentence is imposed under the Sentencing Reform Act of 1984.

☐ the defendant has been found not guilty on count

☐ Count dismissed on the motion of the United States

IT IS FURTHER ORDERED that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

_____	07/30/07
County of Residence	Date of Imposition of Judgment
	/s/ Robert C. Brack
	Signature of Judge
	Honorable RobertC. Brack
	United States District Judge
	Name and Title of Judge
	08/08/07
	Date Signed

IMPRISONMENT

The defendant is committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of **21 months.**

X The court makes these recommendations to the Bureau of Prisons:

El Reno Federal Correctional Institution, El Reno, Oklahoma, if eligible

or

Florence Federal Correctional Institution, Florence, Colorado, if eligible

X The defendant is remanded to the custody of the United States Marshal.

☐ The defendant must surrender to the United States Marshal for this district:

☐ at on

☐ as notified by the United States Marshal.

☐ The defendant must surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before 2 p.m. on

☐ as notified by the United States Marshal

☐ as notified by the Probation or Pretrial Service Office.

RETURN

I have executed this judgment by:

Defendant delivered on _____
to _____ at _____
with a Certified copy of this judgment.

_____
UNITED STATES MARSHAL

_____
Deputy United States Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of **3 years.**

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons. The defendant shall not commit another federal, state, or local crime. The defendant shall not illegally possess a controlled substance.

For offenses committed on or after September 13, 1994:

The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as directed by the probation officer.

☐ The above drug testing condition is suspended based on the courts determination that the defendant possesses a low risk of future substance abuse (Check, if applicable).

X The defendant shall not possess a firearm, ammunition, destructive device, or any dangerous weapon (Check, if applicable).

X The defendant shall cooperate in the collection of DNA as directed by the probation officer (Check, if applicable).

☐ The defendant shall register as a sex offender with the state sex offender registration agency in the state where the defendant resides, works, or is a student, as directed by the probation officer (Check, if applicable).

☐ The defendant shall participate in an approved program for domestic violence (Check, if applicable).

If this judgment imposes a fine or a restitution obligation, it shall be a condition of probation that the defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervised release in accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties sheet of this judgment. The defendant shall comply with the standard conditions that have been

adopted by this court (set forth below). The defendant shall also comply with the additional conditions on the attached page (if indicated below).

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall obtain and maintain full time, legitimate employment, or attend a vocational or academic training program throughout the term of supervised release as directed by the probation officer;

6) the defendant shall notify the probation officer ten days prior to any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement;

SPECIAL CONDITIONS OF SUPERVISION

The defendant shall not possess, have under his control, or have access to any firearm, ammunition, explosive device, or other dangerous weapons, as defined by federal, state, or local law.

The defendant must participate in and successfully complete a substance abuse treatment program which may include drug testing, outpatient counseling, or residential placement. The defendant may be required to pay a portion of the cost of treatment and/or drug testing as determined by the Probation Office.

The defendant must participate in an educational or vocational program as approved by the probation officer.

The defendant must refrain from the use and possession of alcohol and other forms of intoxicants. He must not frequent places where alcohol is the primary item for sale.

The defendant must participate in and successfully complete a mental health treatment program, which may include outpatient counseling, residential placement, or prescribed medication as approved by the probation officer. The defendant may be required to pay a portion of the cost of this treatment as determined by the Probation Office.

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payments.

X The Court hereby remits the defendant's Special Penalty Assessment; the fee is waived and no payment is required.

Totals:	**Assessment**	**Fine**	**Restitution**
	$ Waived	**$**	**$**

SCHEDULE OF PAYMENTS

Payments shall be applied in the following order (1) assessment; (2) restitution; (3) fine principal; (4) cost of prosecution; (5) interest; (6) penalties.

Payment of the total fine and other criminal monetary penalties shall be due as follows:

The defendant will receive credit for all payments previously made toward any criminal monetary penalties imposed.

A ☐ In full immediately; or

B ☐ $ immediately, balance due (see special instructions regarding payment of criminal monetary penalties).

Special instructions regarding the payment of criminal monetary penalties: Criminal monetary penalties are to be made payable by cashier's check, bank or postal money order to the U.S. District Court Clerk, 333 Lomas Blvd. NW, Albuquerque, New Mexico 87102 unless otherwise noted by the court. Payments must include defendant's name, current address, case number and type of payment.

Pursuant to the Mandatory Restitution Act, restitution is applicable; however, no information has been received regarding possible restitution payments that may be owed. Therefore, the Court will not order restitution at this time.

Unless the court has expressly ordered otherwise in the special instructions above, if this judgment imposes a period of imprisonment, payment of criminal monetary penalties shall be due during the period of imprisonment. All criminal monetary penalty payments, except those payments made through

the Bureau of Prisons' Inmate Financial Responsibility Program, are to be made as directed by the court, the probation officer, or the United States attorney.

SECOND ADDENDUM TO THE PRESENTENCE REPORT

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO

UNITED STATES vs. BRIAN RUSSELL DOLAN, 2:06CR02173-001RB

The probation officer certifies that the presentence report, including any revisions thereof, has been disclosed to the defendant, and counsel for the government, and that the content of the addendum has been communicated to counsel. The addendum fairly states any objections that have been made.

OBJECTIONS

By the Government

The Government has not submitted any formal objections to the presentence report concerning this defendant.

By the Defendant

The Defendant has not submitted any formal objections to the presentence report.

Additional Information

On February 8, 2007, the defendant pled guilty to Crime in Indian Country: Assault Resulting in Serious Bodily Injury, a felony. At the time of sentencing on July 30, 2007, the Court determined that restitution is applicable in this case; however, no restitution was ordered until further documentation could provide an amount that is to be paid by the defendant for damages done in the commission of this crime.

Pursuant to 3664(d)(5), the Court shall set a date for the final determination of the victim's losses, not to exceed 90 days after sentencing, which in this case shall be October 28, 2007. On October 3, 2007, the United States Probation Office received additional information regarding requested restitution in this matter. Accordingly, on September 9, 2006, the victim was air lifted and treated at Texas Tech and Thomason Hospital in El Paso, Texas. The cost of his medical care and treatment totaled $105,559.78. This amount is outstanding to the United States Department of Health and Human Services. Copies of the supporting documents for the aforementioned expenses have been attached for the Court's review. Therefore, the total amount of restitution in this case is $105,559.78.

Respectfully submitted,

/S/
DONNA C. JAIME
United States Probation Officer

Approved:

/S/
SUSAN K. LEGARRETTA October 5, 2007
Supervising United States Probation Office

* * * * *

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	NO: CR 06-2173 RB
v.	)	
BRIAN DOLAN,	)	
Defendant.	)	

SENTENCING HEARING

Transcript of Proceedings before THE HONORABLE ROBERT C. BRACK, United States District Judge, held in the city of Las Cruces, Doña Ana County, New Mexico, commencing on Monday, February 4, 2008, at 9:57 a.m. and concluding at 10:07 a.m.

Appearances of Counsel:

For the United States: Mick Gutierrez
Asst. U.S. Attorney

For the Defendant: Jess Lilley
Court-appointed Counsel

[2] (In Open Court at 9:57 a.m.)

THE COURT: *United States of America versus Brian Dolan.* Mr. Dolan is present this morning, along with Mr. Lilley. Mr. Gutierrez is here on behalf of the Government.

We were here late in the summer, at which time Mr. Dolan was sentenced. The question of restitution was raised at that time. We didn't have the numbers prepared by the Department of Health and Human Services, and in the meantime I have received a memo dated October the 4th indicating that—well, the memo actually indicated that the total amount relating to the September 9th, 2006 incident relating to the victim's care was 105,559.78. In the meantime somebody has done a little handwritten notation on there that says it should be 104,649.78. At any rate, we now have that number.

I have a proposed script that would have Mr. Dolan making payments in the amount of 2932.29. I'm concerned about anyone's ability to make monthly payments of that amount. So, Mr. Lilley, let's talk about how we're going to handle this.

MR. LILLEY: Well, Judge, first of all, the 104,649.78, that was an amount that I added up. I think there was a couple of things that were accidentally counted twice. So as far as what the total amount is I have no problem with that.

[3] When I came in here, Judge—and, unfortunately, I might have focused on the wrong thing. First of all, I just snapped as I was sitting here, although I've had this for months, about the Court's ability to order restitution at this time. I reviewed the addendum to the Presentence Report which states—and I don't have my book, and I just

snapped at this about five minutes ago before the Court walked in—that the final date for restitution has to be set within 90 days. So I'm not sure about this Court's jurisdiction. I'm unprepared to argue that, and I don't know if I'm missing something. I'm just kind of going straight off what the second addendum says, and I don't know if the Court has any more information or position about that. I apologize for being unprepared. I just did not—I was focusing on the amounts as opposed to whether this Court still had the ability to order jurisdiction, and I get that straight off of the addendum, which appears to me to indicate no. And obviously I haven't looked at any of the surrounding statutes, so I'm not sure.

With regards to his ability to pay 2900 a month, Judge, that's not going to happen. I'm going to say that's the wrong choice of words. He has no money. This is an individual that has no job. Obviously he's had a drinking problem for many, many years. He lives on the reservation, on assistance by the reservation. He's got a child. His job skills are going to be limited to somebody making minimum [4] wage, I assume. So he could work a hundred hours a week and I don't think he's going to be able to come up with $2900, and I believe he has no assets whatsoever and relies upon the family for support.

So those are my comments to the Court's question about what are we going to do here with regards to restitution, Judge.

THE COURT: Mr. Gutierrez.

MR. GUTIERREZ: Judge, I would suggest that both sides be given an opportunity to submit a very brief memorandum on that issue of whether the

Court can order restitution. I've been looking at the particular section. I've been looking at 18 U.S.C. 3664(d), as in dog, (5). Because it seems to indicate what Mr. Lilley is saying, but then it makes reference to other sections. And when I was asked to come in here, your Honor, I was just — I really didn't know what was going to be the issue until I found out it was going to be restitution. So then I started looking at this whole issue.

THE COURT: Well, I'm looking at 18 U.S.C. 3664(3)(5) as well, and it indicates that the Court shall set a date for the final determination of the victim's losses not to exceed 90 days after sentencing. It may well be that that is jurisdictional. I said as of the end of July I wanted to have this information to supplement the judgment. The memo [5] from Ms. Legarreta came October the 4th, 2007, well within the 90 days. The second addendum dated October 5th alerted us to the 90 day problem. I'm not sure why we're just getting together today when we had this information back in October. But I'll be glad to entertain briefing on the issue of the Court's jurisdiction.

And in another case—and I can't tell you the name at this point—restitution was an issue. I never—I didn't require restitution in a lump sum as the script had suggested I should, because it was unreasonable. It was left unsaid as of my imposing judgment and imposing sentence. I think Barbara picked up that number off of the script and put in the judgment that that amount would be paid in a lump sum. Well, Mr. Robert took it up, of course, and it was reversed, of course, because there has to be discussion with findings made by the Court relating to the

defendant's ability to pay, and it came back on that basis.

So we have two issues. The jurisdiction is one. The amount and Mr. Dolan's ability to address that amount in a reasonable fashion is the other. One may trump the other, depending on what you come up with, but I'd like that briefing within ten days, and I'd like the matter back on the calendar, please by mid month.

Anything this morning?

MR. LILLEY: Nothing further, Judge. Thank you.

[6] THE COURT: Mr. Gutierrez?

MR. GUTIERREZ: Nothing further from the United States, your Honor.

THE COURT: All right. Thanks very much. We're adjourned.

(The proceedings concluded at 10:07 a.m.)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	NO: CR 06-2173 RB
v.	)	
BRIAN DOLAN,	)	
Defendant.	)	

RESTITUTION HEARING

Transcript of Proceedings before THE HONORABLE ROBERT C. BRACK, United States District Judge, held in the city of Las Cruces, Doña Ana County, New Mexico, commencing on Friday, April 11, 2008, at 9:43 A.M. and concluding at 10:13 A.M.

Appearances of Counsel:

For the United States (appearing telephonically):
Assistant United States Attorney
Presiliano Torres, Esq.

For the Defendant:
Court-appointed Counsel
Jess Lilley, Esq.

[2] (In Open Court at 9:43 A.M.)

THE COURT: *United States of America versus Brian Dolan.* Mr. Dolan is present this morning, along with Mr. Lilley. Ms. Torres, representing the Government, appears telephonically.

We're here pursuant to a question of restitution. Mr. Dolan was sentenced on July 30th, 2007. At that time, I indicated that restitution wasn't going—while it was an issue, I wasn't going to order a particular number because we didn't have that number available to us. Sometime in October, Probation got the second addendum together that identified a restitution amount. And for reasons that I'm not clear about at this point, we didn't actually get together to impose that final number until February, at which point, Mr. Lilley, on behalf of his client, raised this issues of jurisdiction, citing 18 U.S.C. § 3664(d)(5), which requires that the court set a date for the final determination of the victim's losses not to exceed 90 days after sentencing. I asked for briefing on that issue and, in the meantime, I've received Mr. Lilley's memo dated and filed February 15th and the Government's response thereto filed March the 5th.

I have reviewed all of that, as well as the transcript from the sentencing hearing, itself. And this morning, I was told that Mr. Torres was going to seek a [3] continuance of this matter.

Mr. Torres?

MR. TORRES: Your Honor, I had originally thought about that. I have a procedure scheduled, but it's going to be this afternoon; it's not going to interfere. And we were, yesterday evening, reaching out for the victim and they made their best efforts to do that and were unable to do it, but I assume that

since this matter—we told the officers to tell the sister that it related to the payment of these medical bills, and so we will fill them in with regard to that. Those were my two concerns, but I'm ready to proceed today.

THE COURT: All right. Thank you.

Mr. Lilley, I've read your—the brief and some of the case law referenced in that document, as well as the Government's. And I'm not convinced at this point that it is jurisdictional, but I'll hear you, if you've got anything you want to add to your memo.

MR. LILLEY: Judge, just with regards to the Court's ability to order it, obviously, we have the statute which indicates it's mandatory within 90 days. And mandatory doesn't turn out to be mandatory as—you know, Counsel—

MR. TORRES: Excuse me. If he could speak up just a little bit. I'm having difficulty hearing him. [4]

THE COURT: We'll have Mr. Lilley situate himself a little closer to the mic.

MR. LILLEY: Judge, just to start over again, obviously, the statute indicates it's mandatory. The case law indicates mandatory does not really mean mandatory. And as Counsel has cited, there's a couple of cases which essentially talk about the functional equivalent of the statute. And I think what Counsel hasn't really set forth and didn't respond to is, functional equivalent—there's essentially two notices—or two elements of restitution. One is notice and one is time. And both the cases cited by the Government, the *Dando* case and the *Riano* case, the

Court held that there was functional equivalent in those cases. Functional equivalent of notice.

And in one of those cases, I believe in the *Dando* case, there was a hearing within the 90-day period. I think the Government submitted a restitution amount 37 days into the 90-day period. There was a hearing 71 days into the 90-day period, at which time, the defendant continued it. The Court found that there was sufficient notice and functional equivalent of—defendant had notice that there was a restitution issue because restitution was left essentially open at sentencing.

The *Riano* case is a little bit different. In that situation, the parties went to sentencing, there had [5] been really no information or talk about restitution. The Court, just on its own, kind of came up with a $10,000 figure, which obviously, the Court of Appeals says you can't do that; there has to be some basis for the amount. Nevertheless, the Court in that case also felt that the notice requirement to the defendant—there was a functional equivalent to that because everybody knew essentially that restitution was an issue.

Well, what distinguishes Mr. Dolan's case from both of those cases is the 90-day time period. In the first case, in the *Dando* case, the defendant continued the hearing—at the 71st day, the defendant continued the hearing; therefore, the Court says—the Court of Appeals said that the 90-day time limit is tolled because defendant can't continue something and then reap the benefits because it goes beyond 90 days.

In the *Riano* case, which the Court still cited—I don't know the exact page here—but (reading), *The Court's authority to order restitution post-sentencing derives solely from the statutory grant of jurisdiction—cites the statute—the notice and time requirements imposed by jurisdictional statutes generally are mandatory. Courts lack authority to act in the cases where the litigants have not satisfied those requirements.* That was cited in the *Riano* case, which was also cited in *Dando*.

[6] In the *Riano* case, the Court held that the time requirement was tolled because defendant filed a notice of appeal, assumingly, within the 90 days. So in both *Dando*, both *Riano*, the Court says, functional equivalent of notice because restitution was an issue within 90 days; although, the exact amounts are not known, but the time, 90 days, had been tolled in both cases.

In this case, we have no tolling—I mean, the Court—admittedly, I mean, we knew about restitution. We had been given the total before the 90-day time limit. We admit to that in this case, that restitution was out there. But we have no tolling of the 90 days in this case.

It's—you have some language in *Vanderburg*, which I had cited, which talks about, well, it's not really a jurisdictional statute; it's quasi-jurisdictional. And yet we say—later on, in *Dando*, we still reiterate that—those cases were decided—and *Riano* says it's a very limited holding—but those cases have decided that the 90-day time period, which I would argue is still jurisdictional, was tolled in both of those cases.

We don't have a tolling of the 90-day period. I think it's clear from *Vanderburg*, it's clear from *Dando* and it's clear from *Riano* that the 90-day period is still important to the Court of Appeals. It's still mandatory in the statute, unless there's some sort of tolling, which we [7] do not have here.

Kind of not a major point, but the Government cites numerous times that we agreed in the plea agreement to pay restitution. I think there's a stretch of what the plea agreement actually says. There is one reference to restitution in the plea agreement. That reference is where the Court—on page 2, what is the maximum sentence? Up to ten years in jail, quote (reading), *(e) restitution as may be ordered by the Court.* So we jump from restitution, as may be ordered by the Court—obviously, we knew restitution was an issue, but then to repeatedly say we agreed to pay restitution is like saying we agreed to pay $250,000. I mean, we don't agree to pay restitution. We pay restitution if the Court orders to pay restitution. Nowhere else in the plea agreement, under defendant's obligations, could I find any other reference to we agreed to pay restitution.

Now, that might be somewhat of a minor point because, obviously, we knew restitution was an issue at sentencing and remained to be an issue through the 90-day period. But Judge, I would argue that the 90-day period is still important to the Tenth Circuit and should still be important to this Court, and that time limit has not been tolled.

THE COURT: Mr. Lilley, you have acknowledged [8] that restitution was—or the possibility or restitution was known to Mr. Dolan from at least the signing of the plea agreement, that it was discussed

at sentencing and, within the 90-day period, he was advised of what the number was. Now, there wasn't that reconvening of the sentencing hearing at which time that number would have been imposed. And whether it's jurisdictional or mandatory, obviously, I have to deal with that. But is there any prejudice to Mr. Dolan?

Part of the reason for the 90 days is to protect the victims against dissipation, but part of it is to protect the—is the notice issue to the defense, so that they can make their plans, that they can do what they need to do, and this doesn't need to be hanging over their heads over time. Is there any prejudice to Mr. Dolan that you can articulate?

MR. LILLEY: Other than you have to pay back—other than the Court ordering you to pay back $100,000, I think, in and of itself, is prejudice. I mean, Judge, I can't dispute that. We knew about the total within the 90-day period. We always knew restitution would be an issue. Can I cite to anything specific other than it's a lot of money to pay back and he would have the—he doesn't really have the ability to pay back, which, obviously, is a different issue, but other than those types of prejudice, I can't articulate anything, Judge, because we have to admit [9] we knew about it prior to the 90 days.

THE COURT: All right. Thank you.

Mr. Torres?

MR. TORRES: Your Honor, first of all, I think that the Court is correct, the defendant, in his plea agreement, has agreed to make restitution. The trial transcript—and I'd ask the Court to—the Court has said it's reviewed it. I just point out on page 17. The

Court explicitly told the defendant that the Mandatory Restitution Act was applicable and that there was insufficient time at that point to order the restitution.

Additionally, it is recognized in the Judgment as part—on page 2 of the sentencing minutes, Document 38, it says that at this time, none of the—ordered—restitution is not ordered at this time, but it leaves the matter opening—open until it receives further information, which this Court has indicated it received in October. So consequently, I don't think it matters that the 90 days—we're not claiming that the 90 days were tolled at that point. But what matters is that the defendant, at this point, has—he's got notice in the plea agreement; he's agreed to that. In addition, he's also agreed—and this is an issue that we did not brief, but I know that that's a part of it—is that I don't know that he could even take an appeal of this. Since this is part and parcel [10] of the plea agreement, I'm not sure whether he could even appeal a ruling today, if he considers it adverse to himself. He's agreed to waive his appeal rights.

Additionally, as the Court points out, the statute—what is consistent with Congress' concern is—with respect to the 90 days, is that the 90-day period was set in order to prevent the dissipation of the defendant's assets, as opposed to a time frame to protect the defendant from a drawn-out proceeding. There is no—there is no showing here, there is not even a claim, that the defendant's rights have in any way been compromised. Consequently, any claim that there's harm here hasn't even been suggested.

So I think that the—if we read the—as we read *Riano*, and it points out the precedent in *Dando*, the

Restitution Act is supposed to be—the procedural requirements are to be construed liberally. And in so doing, I think this Court could find and make a finding that, in fact, the matter was left open; that the defendant agreed, pursuant to a plea agreement, to abide by and pay restitution to the victim as ordered by the Court; and that the—that in—with regard to the fact that it was not done within 90 days, that the Court has not lost jurisdiction but, rather, that there are the—the defendant has received the functional equivalent of notice, [11] and of the fact that restitution to be requested, and therefore, any losses by the victim should be ordered.

And I think that the—that if there is a failure to follow precisely all statutory rights that—really, when you look at it, as a whole, once he received the information in October, if he disagreed with the amount, he had a right to file an objection at that point, which was not done. When I first spoke to Counsel about the restitution matter, there was no pleading filed at the last hearing before restitution. He agreed that what was going to happen is that restitution was going to be, in fact, set by the Court. And then, at that hearing, he raised the matter of jurisdiction, and so that's what brings us here today.

But I think that in terms of the compliance with what the Congressional intent is of the statute that the Court and the Government have done that and that Mr. Dolan must now pay restitution. And I'd ask the Court to make those findings.

THE COURT: Thank you, Mr. Torres.

Mr. Lilley, I'm going to take that issue under advisement. If I go to the next step, of course, I have

to set a payment schedule that is reasonable in terms of Mr. Dolan's ability to pay. I have—there are the four factors set out in *Ahidley*, a case that I know very well. **[12]** So let's talk about that.

MR. LILLEY: Judge, I am prepared to put Mr. Dolan on the stand also his mother, Mrs. Dolan. I can make a proffer to the Court. Most of it is essentially already established in the Presentence Report, so it's part of the record. But if maybe I can make a proffer, and if the Government does not dispute that, then maybe we can go on that. Otherwise, you know, I'd put them both on for five or ten minutes to talk about the situation.

THE COURT: Mr. Torres, any objection to proceeding on that basis?

MR. TORRES: No.

THE COURT: Make your proffer, Mr. Lilley.

MR. LILLEY: Judge, Mr. Dolan is 30 years old. He was born on the Mescalero Reservation, up near Ruidoso, New Mexico. He is part of the Mescalero Tribe. He is now 30 years old. He did not graduate high school. He got his GED while in about 2000, while he was incarcerated. And I think, in a facility in either northern New Mexico or southern California, he had had—was ordered to rehab up there and either did it in a rehab or in an incarcerated facility.

He was—prior to that, he had a sporadic work history. He has worked in construction, landscaping, as a fire fighter, as a waiter. He's worked at the Ski Apache **[13]** Ski Resort and has also worked maintenance at the Inn of the Mountain Gods. None

of these jobs have lasted more than five or six months. Most of these jobs, he's making between $7 and $9 an hour. He did make a little over $14 an hour as a seasonal fire fighter for a short period of time.

* * * * *

[Mr. Dolan] was incarcerated on this case in September—about September either the 19th or the 20th or 21st, right around there. He has been—continued to be incarcerated; was released on March 20th of this year, 2008, which is just several weeks ago, after completing the sentence ordered by the Court. He has since returned to the Mescalero Reservation. He lives currently—has been paroled or is doing his supervised release. He lives with his Aunt Rose and Uncle Keith. Rose is 82 years old. Keith is 81 years old. They are both retired and live on assistance, retirement assistance from the tribe.

* * * * *

[14] Since his release on March 20th, Mr. Dolan is relying on the support of his aunt. He doesn't pay for food. He doesn't pay for support of the home or anything like that; any input or any money, whatsoever. The only money he has—I think he has either a checking account or savings account with $25 in it, which is the minimum amount to keep it open. He has—as set forth in the Presentence Report, he has no other assets. I think at the time he was arrested, he had a vehicle that he was paying on. That vehicle was subsequently confiscated. I don't think he even knows where it is. He does not have a vehicle. H has no assets, whatsoever. No furniture. The only thing he has are clothes.

* * * * *

[16] That is all I have with regards to a proffer, Judge.

THE COURT: Thank you.

Mr. Torres?

MR. TORRES: Your Honor, I would just point out Paragraph 78 through 81 of the Presentence Report at the time of his—I guess at the time of his arrest, he was making $14.68 an hour working as a seasonal fireman for the United States Forestry Service in Ruidoso. I know that the fire season is about to start. I don't know whether that implicates his possibility of getting a job or not.

Additionally, it looks like, at one point, he was employed in 2004 at $500 a week as a landscaper. And then there are two other jobs in 2004. And then going back to 1995 to 1997, where he was making minimum wage, working both at Ski Apache for 7.50 an hour and then at the Inn of the Mountain Gods.

Additionally, what I didn't see reflected in the Presentence Report—and I ask Counsel, and perhaps if there's somebody from Probation there, to verify this — but I know that most members of the Mescalero Tribe receive a stipend on a quarterly basis. And I don't know, it depends on, I would imagine, the number of family members, but some of those stipends, you know, could be up to four-or $500, so I would ask that the Court inquire about that and—[17] through Probation, and see if there is the possibility of that.

And then—just looking at that, I would just ask the Court to apply the factors in *Ahidley* and set a reasonable schedule of payments. It may be a long,

long time in paying this off, but I'm sure that something can be fashioned where some—you know, if it can't be all the restitution, but the great majority of the restitution can be made.

THE COURT: Mr. Lilley, do you have any input on this quarterly stipend question?

MR. LILEY: If I may inquire of him and his mother, Judge? Just one second.

(Discussion off the record)

THE COURT: Mr. Lilley?

MR. LILLEY: Judge, first of all, with regards to employment, Counsel indicated Paragraph 78. Paragraph 78 says he was unemployed at the time of the offense, so he wasn't making 14.68 an hour at the time this offense occurred. That is seasonal employment that he has had in the past. Mr. Dolan tells me, essentially, he was fired from that the last time he worked with the Forest Service, and they told him he was fired for life. I don't know what that meant, but his ability to go back to that job seems to be in question.

[18]He does have income from the tribe. He told me it's about $1,150 a year, which was confirmed by his mother, except that half of that is taken out and goes to the support of the 11-year-old. So essentially, he tells me that his—the money from the tribe to him is roughly 550, $575 a year to him. Personally.

THE COURT: All right. Anything else, then, Mr. Torres?

MR. TORRES: No, Your Honor.

THE COURT: Counsel, I'm going to take the matter under advisement. I'll get you a decision out just as quickly as I can.

Mr. Dolan, you're out. You're back at the reservation. I'm pleased that you got through the service of your sentence, and I ask you to just continue to abide by the conditions of your supervised release. I'll have something to you just as soon as I can. Thank you.

MR. LILLEY: Thank you, Judge.

THE COURT: Mr. Torres, we'll be hanging up now.

MR. TORRES: Thank you.

THE DEFENDANT: Thank you, Your Honor.

(The proceedings concluded at 10:13 A.M.)

PETITIONER'S BRIEF

(4)

No. 08-367

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IN THE
Supreme Court of the United States

BRIAN RUSSELL DOLAN,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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QUESTION PRESENTED

Whether a district court may enter a restitution order beyond the time limit prescribed in 18 U.S.C. § 3664(d)(5).

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BRIEF FOR PETITIONER

Petitioner Brian Russell Dolan respectfully requests that this Court reverse the judgment of the United States Court of Appeals for the Tenth Circuit.

OPINIONS BELOW

The order of the Court of Appeals for the Tenth Circuit granting the petition for rehearing, adding a footnote to the original panel opinion, and denying the petition for rehearing en banc (Pet App. 1a-3a) is unpublished. The opinion of the Court of Appeals for the Tenth Circuit as amended (Pet. App. 4a-26a) is published at 571 F.3d 1022. The district court's opinion (Pet. App. 27a-48a) is unpublished.

JURISDICTION

The order of the court of appeals denying petitioner's petition for rehearing en banc was filed on June 26, 2009. Pet. App. 1a. The petition for a writ of certiorari was filed on September 23, 2009. This Court granted the petition on January 8, 2010. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

The full versions of 18 U.S.C. §§ 3663A and 3664 are set out in the Petition Appendix at pages 49a-60a.

With respect to crimes of violence, Section 3663A(a)(1) provides, in pertinent part:

> [W]hen sentencing a defendant . . . , the court shall order, in addition to . . . any other penalty authorized by law, that the defendant make restitution to the victim of the offense or, if the victim is deceased, to the victim's estate.

Section 3664(d)(5) provides:

> If the victim's losses are not ascertainable by the date that is 10 days prior to sentencing, the attorney for the Government or the probation officer shall so inform the court, and the court shall set a date for the final determination of the victim's losses, not to exceed 90 days after sentencing. If the victim subsequently discovers further losses, the victim shall have 60 days after discovery of those losses in which to petition the court for an amended restitution order. Such order may be granted only upon a showing of good cause for the failure to include such losses in the initial claim for restitutionary relief.

STATEMENT

Petitioner, a Mescalero Apache Indian, was convicted in federal court of assaulting an acquaintance on the reservation. The question presented in this case concerns the power of the district court to sentence petitioner to pay over $100,000 to the federal Indian Health Service for the victim's medical expenses when that restitution order was issued six months after the 90-day

deadline provided in 18 U.S.C. § 3664(d)(5) had expired.

A. Statutory Framework

The Mandatory Victims Restitution Act of 1996 (the MVRA) provides, in pertinent part, that "when sentencing a defendant" convicted of a crime of violence, "the court shall order, in addition to . . . any other penalty authorized by law, that the defendant make restitution to the victim of the offense." 18 U.S.C. § 3663A(a)(1).[1] The procedures of 18 U.S.C. § 3664 "apply to all orders of restitution," 18 U.S.C. § 3556, including orders issued pursuant to the MVRA, 18 U.S.C. § 3663A(d).

When a defendant has been convicted, either after trial or upon a guilty plea, the district court sets a sentencing date. *See* Fed. R. Crim. P. 32. As part of the sentencing process, a probation officer must then prepare a presentence report. Fed. R. Crim. P. 32(c)(1). Section 3664 sets out a detailed procedure, including a timeline leading up to the sentencing, for issuing and enforcing restitution orders in criminal sentences. Under the MVRA, restitution is normally ordered "when sentencing" a defendant. 18 U.S.C. § 3663A(a)(1). Accordingly, the Government must, "not later than 60 days prior to the date initially set for sentencing, . . . provide the probation officer with a listing of the amounts subject to restitution." 18 U.S.C. § 3664(d)(1). The

---

[1] Subsection 3663A(a) requires restitution in cases involving "a defendant convicted of an offense described in subsection (c)." Subsection 3663A(c)(1)(A)(i), the relevant provision in this case, includes any offense that is "a crime of violence as defined in [18 U.S.C. §] 16."

probation officer then uses that information – along with other information obtained from the victims and the defendant, *see* 18 U.S.C. § 3664(d)(2), (d)(3) – to include "in its presentence report, or in a separate report, as the court may direct, information sufficient for the court to exercise its discretion in fashioning a restitution order." 18 U.S.C. § 3664(a). If there is a dispute over the amount being sought, Section 3664(d)(4) authorizes the court to "require additional documentation or hear testimony" before imposing restitution. The Government bears "[t]he burden of demonstrating the amount of the loss sustained by a victim as a result of the offense." 18 U.S.C. § 3664(e).

The statute recognizes that there may be cases where the victim's losses "are not ascertainable by the date that is 10 days prior to sentencing." 18 U.S.C. § 3664(d)(5). In these cases, the Government or the probation officer "shall . . . inform the court" of the situation. The court may then proceed with sentencing,[2] but "shall set a date for the final determination of the victim's losses, not to exceed 90 days after sentencing." *Id.*[3]

After a district court has sentenced a defendant – a proceeding that takes place in open court in the presence of defendant and his counsel – the court

---

[2] Fed. R. Crim. P. 32(b) would also permit the court to delay sentencing until it has ascertained the necessary information.

[3] Section 3664(d)(5) also provides for amendment of a restitution order if a victim petitions within 60 days of discovering subsequent losses. Such an order "may be granted only upon showing of good cause" for the failure to include such losses in the initial claim of restitution. *Id.*

enters a written judgment pursuant to Fed. R. Crim. P. 32(k), "set[ting] forth," among other things, "the adjudication, and the sentence."

B. Statement of Facts

1. In September 2006, petitioner Brian Russell Dolan and Evan Ray Tissnolthtos, acquaintances who are both members of the Mescalero Apache Indian Tribe, got into a fight on the tribal reservation. Tissnolthtos was seriously injured. He was taken to the hospital and treated at the Government's expense under the Indian Health Service medical program. J.A. 27.

Neither petitioner, because he was intoxicated at the time, nor Tissnolthtos, because of his injuries, remembered the relevant events clearly. *See* J.A. 23, 33. After petitioner's sister contacted the Bureau of Indian Affairs police, they questioned petitioner and subsequently arrested him. Petitioner was charged in the United States District Court for the District of New Mexico with assault resulting in serious bodily injury. J.A. 1; *see* 18 U.S.C. § 1153 (conferring federal jurisdiction over crimes within Indian country); *id.* § 113(a)(6) (governing assaults).

Petitioner pleaded guilty on February 8, 2007. J.A. 2, 19. The plea agreement noted that the sentence petitioner faced could include "restitution as may be ordered by the Court." J.A. 18. The plea minute sheet provided that sentencing would be set "within 75 days" (that is, by April 24, 2007), and ordered that the probation office file a presentence report. J.A. 20.

Petitioner remained in custody. On May 30, 2007, the probation office filed a Presentence Investigation Report (PSR). J.A. 21. The PSR noted the applicability of the MVRA, but stated that because the federal Indian Health Service had not responded to repeated requests for medical expenses borne by the agency, "no information has been received regarding possible restitution payments that may be owed."[4] J.A. 27. The PSR indicated that "[u]pon receipt of said information, it will be forwarded to the Court for consideration." *Id.*

On June 20, 2007, after reviewing the initial PSR and petitioner's sentencing memorandum responding to the PSR, the district court set sentencing for June 28, 2007. J.A. 2. On June 27, 2007, the United States moved to continue the sentencing in order to enable the victim's sister to attend and address the court. J.A. 28. The court granted that motion, J.A. 30, and subsequently scheduled sentencing for July 30, 2007. J.A. 3.

At the July 30 sentencing hearing, the district court sentenced petitioner to 21 months' imprisonment followed by three years' supervised release. J.A. 38. The court, however, recognized that there were questions regarding the scope of potential restitution. *See* J.A. 35. The Government's official victim advocate informed the court that the Government had been unable to contact Tissnolthtos but was aware an outstanding medical bill of $80,000. She then asked whether the court

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[4] The PSR also indicated that Tissnolthtos had claimed lost wages, but that the probation officer had not been able to obtain documentation to support that claim. J.A. 26.

"want[ed] to give 90 more days for restitution." *Id.* The court responded: "Well, I think the script anticipates that I'm just leaving the question of restitution open-ended because we don't have a good number at this point." *Id.* Later in the proceedings, the court stated: "Pursuant to the mandatory restitution act, restitution is applicable. However, there is insufficient information on the record at this time regarding possible restitution payments that may be owed; therefore, I'm not going to order restitution at this time, but leave that matter open, pending receipt of additional information." J.A. 39-40.

On August 8, 2007, the district court entered judgment, using the standard Administrative Office form for judgment in a criminal case. J.A. 42. The court left blank the section for setting the amount of restitution. J.A. 48. In the section for scheduling restitution payments, the court provided no schedule, instead noting that "[p]ursuant to the Mandatory Restitution Act, restitution is applicable; however, no information has been received regarding possible restitution payments that may be owed. Therefore, the Court will not order restitution at this time." J.A. 49.

On October 5, 2007 (67 days after petitioner was sentenced), the probation office prepared an addendum to the PSR indicating that it had received information that the victim's medical expenses totaled $105,559.78.[5] J.A. 52. The addendum also

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[5] The parties later agreed that the correct amount was actually $104,649.78. J.A. 54; *see* Pet. App. 47a.

noted that the 90-day time limit set by Section 3664(d)(5) would expire "on October 28, 2007." *Id.*

It is "unclear when the Court received the Second Addendum." Pet. App. 31a. In any event, the Government made no motion or other effort to obtain a restitution order. *Id.* Nor did the court take any action to impose restitution before the 90-day period expired.

The district court's next action did not occur until January 28, 2008. Nearly six months after petitioner's sentencing, and 92 days after the period set by Section 3664(d)(5) had run, the district court sua sponte issued a "Notice of Hearing as to Brian Dolan Sentencing (restitution)" for February 4, 2008. J.A. 3-4.

At the February 4 hearing, petitioner immediately raised an objection to the court's ability to order restitution after the expiration of the 90-day period set by Section 3664(d)(5). J.A. 54-55. The court recognized what it described as a possible "jurisdictional" problem, J.A. 56, and asked for additional briefing. J.A. 57.

Although the court initially ordered that the briefing be completed within ten days, J.A. 57, the Government moved for and received an extension. Eventually, the court held oral argument on April 11, 2008. *See* J.A. 58-71. At the hearing, the court noted that it was "pleased" that petitioner had "got[ten] through the service of [his] sentence" and had returned home. J.A. 71. On April 24, 2008—269 days after sentencing—the court determined that it retained authority to order restitution and issued a "Memorandum Opinion and Restitution

Order" requiring petitioner to pay the Indian Health Service $104,649.78 "in nominal periodic payments of $250.00 per month." Pet. App. 27a-48a; *see* J.A. 5.

2. Petitioner timely appealed the April 24, 2008, order to the Tenth Circuit, renewing his claim that the district court lacked the ability, once the 90-day period of Section 3664(d)(5) had expired, to order restitution.[6]

The court of appeals affirmed. It rejected the claim that Section 3664(d)(5)'s 90-day deadline was "jurisdictional" in the sense that "the district court's power to enter any restitution order expired 90 days after [petitioner's] sentencing." Pet. App. 9a (emphasis omitted). Instead, the court of appeals embraced a "better-late-than-never principle," Pet. App. 13a, under which district courts effectively retain permanent authority to impose restitution.

The court of appeals' analysis began by referring to the MVRA's directive that "*[n]otwithstanding any other provision of law*, when sentencing a defendant convicted of [an offense covered by the Act], the court *shall* order . . . restitution." Pet. App. 9a (quoting 18 U.S.C. § 3663A(a)(1) (emphasis and alterations by the court)). It reasoned that the obligation to order restitution thus "overr[ode] conflicting provisions of any other section" of the Act, including the time limits of Section 3664(d)(5). Pet. App. 10a (quoting *Cisneros v. Alpine Ridge Group*, 508 U.S. 10, 18 (1993)). It also relied on the title of Section 3664 –

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[6] Petitioner also challenged the restitution payment schedule ordered by the district court, but he does not renew that issue before this Court.

"*Procedure* for issuance and enforcement of order of restitution." Pet. App. 11a (quoting 18 U.S.C. § 3664 (emphasis by the court)). It thought that the use of the word "procedure" indicated that Section 3664(d)(5) was not a jurisdictional statute. Pet. App. 11a.

Second, with respect to canons of statutory construction, the court of appeals pointed to a principle against "readily infer[ring] congressional intent to limit an agency's power to get a mandatory job done merely from a specification to act by a certain time." Pet. App. 12a (quoting *Barnhart v. Peabody Coal*, 537 U.S. 149, 160 (2003)). Although Section 3664(d)(5) required restitution to be ordered within 90 days of sentencing, it had "no other language purporting to deny district courts the authority to enter late restitution orders." Pet. App. 13a.

Third, the court of appeals asserted that the MVRA's legislative history reinforced its conclusion. The Senate Committee Report accompanying the Act, it declared, "makes plain that its emphasis on the need for speed and finality arises out of concern for victims, not victimizers." Pet. App. 16a. Quoting its prior decision in *United States v. Dando*, 287 F.3d 1007, 1010 n.4 (10th Cir.), *cert. denied*, 537 U.S. 917 (2002), the court declared that "Congress intended the 90 day limitation period to protect victims against the dissipation of defendants' assets and not to protect defendants from a drawn-out sentencing process or to establish finality." Pet. App. 17a.

Thus, even if delay was "caused by the government or district court, rather than by the

defendant," the court of appeals held that "the passing of § 3664(d)(5)'s deadline does not toll the death knell of the district court's subject matter jurisdiction" to order restitution. Pet. App. 18a.

The court of appeals recognized that "some of [its] sister circuits" had "held out the possibility" of providing a remedy to defendants who had been prejudiced by a violation of Section 3664(d)(5) but found itself "unsure whether Congress has authorized us to excuse a defendant from the obligation to pay restitution for offenses covered by the MVRA under *any* circumstances." Pet. App. 20a (emphasis added).

3. Petitioner moved for rehearing and rehearing en banc. The panel granted the petition for rehearing "for the limited purpose" of adding a footnote to its original opinion to address petitioner's claim that its opinion conflicted with an earlier Tenth Circuit case, *United States v. Bedonie*, 413 F.3d 1126 (10th Cir. 2005). Pet. App. 1a. The petition for rehearing en banc was denied. Pet. App. 3a.

4. Petitioner sought review from this Court. On January 8, 2010, this Court granted the petition for writ of certiorari. 130 S. Ct. ___ (2010).

SUMMARY OF ARGUMENT

I. The Mandatory Victims Restitution Act authorizes district courts to impose restitution as part of a criminal sentence "when sentencing" a defendant, 18 U.S.C. § 3663A(a)(1), and, if necessary, for a period "not to exceed 90 days after sentencing,"

id. § 3664(d)(5). The MVRA does not give district courts free-ranging power to impose restitution indefinitely. In this case, the district court tried to impose restitution 269 days after sentencing petitioner. The district court erred in entering a restitution order outside the statutory time period.

Section 3664(d)(5) lays out timing rules governing "the initial claim for restitutionary relief" in a criminal sentencing. Like other claims-processing rules that contain mandatory language and set a definite end to judicial proceedings, Section 3664(d)(5)'s time limit cannot be disregarded by a district court when – as here – it has been properly invoked by a defendant.

That Section 3664(d)(5)'s 90-day provision is a deadline, rather than an aspirational admonition, is reinforced by the 60-day discovery and good-cause requirement that appears in the next sentence. The 60-day requirement, which addresses the availability of "an amended restitution order," would be either superfluous or perverse if the 90-day deadline set no limit on a district court's power. And the 90-day rule's status as a definite time limit is further emphasized by contrasting its mandatory language with the expressly permissive language used in other parts of Section 3664 that, for example, impose no time limits on a district court's power to "adjust" a defendant's payment schedule in light of "any material change in the defendant's economic circumstances," *id.* § 3664(k) – whenever that change might occur – or that temper responsibilities of the Government, the probation office, or the court by

requiring compliance only "to the extent practicable," *id.* §§ 3664(a), 3664(d)(1), 3664(d)(4).

The fact that restitution is part of a defendant's criminal sentence provides additional support for the plain language interpretation of Section 3664(d)(5)'s deadline as a limit on district courts' power to order restitution. Federal law contemplates that all aspects of a defendant's punishment, including restitution, will be imposed in a single sentence (and, indeed, that the court will consider how the forms of punishment interact with one another in setting the various terms). Shortly after that sentence is imposed, a court is expected to enter a final judgment that serves to define the contours and timing of any subsequent appellate proceedings.

Because a final judgment in a criminal case must resolve all aspects of a defendant's sentence, restitution under the MVRA must be determined – either by the court or by operation of law – before judgment can become final. Section 3664(d)(5) performs a critical function by setting an outer limit on how long a court has for "final determination" of a defendant's sentence: the district court has 90 days from the time of initial sentencing to complete the sentence and set in motion any subsequent appeal, as well as important aspects of the correctional process. By contrast, under the Tenth Circuit's approach, the judgment in a criminal case cannot become final unless and until the district court orders restitution – whenever that might be. The indefinite delay of a defendant's right to appeal his conviction and other aspects of his sentence countenanced by this approach poses a serious due

process problem. Trying to cure that constitutional difficulty would produce either piecemeal litigation or jurisdictional difficulties that could delay restitution even further. By contrast, compliance with Section 3664(d)(5)'s 90-day deadline poses no practical difficulties and ensures an efficient and constitutionally adequate sentencing process.

Treating Section 3664(d)(5) as a mandatory deadline thus best serves the broad purposes of the MVRA. In providing a streamlined process for obtaining restitution at sentencing or shortly thereafter, Congress did not create stand-alone, drawn-out satellite litigation. Protracted restitution proceedings would serve the interests of neither courts, nor defendants, nor victims. Among other things, Section 3664(d)(5)'s time limits protect the defendant's constitutional right not to be sentenced on the basis of inaccurate information. And treating the 90-day limit as a real deadline also serves victims better than the Tenth Circuit's lackadaisical "better-late-than-never" approach, which removes an important statutory incentive for prosecutors and courts to address restitution claims promptly.

The language, structure, and purposes of the MVRA all point in the same direction: Section 3664(d)(5) imposes a 90-day limit on when a court can impose restitution as part of a criminal sentence. But if any ambiguity were to remain, this Court's decision in *Hughey v. United States*, 495 U.S. 411 (1990), which construed the availability of restitution under the predecessor to the MVRA, shows that the rule of lenity requires treating Section 3664(d)(5) as a limit on the district court's power.

II. The district court's error in sentencing petitioner to pay restitution outside of the time provided by Section 3664(d)(5) requires reversal. As an initial matter, the district court was not entitled to cancel out its earlier (and by then unreviewable) error of not ordering restitution within 90 days of sentencing by committing a second error – issuing a restitution order, months later, that was not authorized by Section 3664(d)(5). Nor in light of the MVRA's command that any "order of restitution under this section shall be issued and enforced in accordance with section 3664," *id.* § 3663A(d), was the court of appeals permitted to ignore petitioner's properly preserved objection to the imposition of a restitution order that violated Section 3664(d)(5).

The district court's entry of an untimely restitution order cannot be treated as harmless. First, the order in fact prejudiced petitioner. A defendant has the right not to be sentenced except as authorized by statute. *United States v. Hudson and Goodwin*, 11 U.S. 32 (1812). By definition, an illegal sentence violates a defendant's "substantial rights." Fed. R. Crim. P. 52(a).

The outcome in this case was an illegal sentence, entered after the time provided by statute. Petitioner was sentenced to pay nearly $105,000 at a time when the district court had no authority to order him to pay any restitution. The fact that there was a time, by then long gone, when the sentence would have been legal is irrelevant.

More fundamentally, harmless-error analysis is inappropriate in cases involving statutory time limits properly invoked by defendants in criminal cases.

Convictions obtained by prosecutions commenced after the statute of limitations has run, for example, are not subject to harmless-error review; reviewing courts do not ask whether the Government would have obtained a conviction had it pursued the defendant more diligently. So, too, violations of the Speedy Trial Act require reversal per se. The same rule should obtain here. If Congress had intended to permit courts of appeals to consider the timeliness of district courts' decisions to order defendants to pay restitution on a case-by-case basis, it would have written the MVRA quite differently. Giving full effect to Congress's language forbids appellate courts from abandoning a statutory limitations period in favor of a common-law laches approach, especially in a criminal case.

ARGUMENT

I. THE DISTRICT COURT ERRED IN IMPOSING A RESTITUTION ORDER OUTSIDE OF THE STATUTORY TIME LIMIT AUTHORIZED BY SECTION 3664.

There is no federal common law of crimes or criminal sentencing. *United States v. Hudson and Goodwin*, 11 U.S. (7 Cranch) 32, 34 (1812). "[T]he guarantee of the process provided by the law of the land assures prior legislative authorization for whatever punishment is imposed." *Dep't of Revenue of Mont. v. Kurth Ranch*, 511 U.S. 767, 799 (1994) (Scalia, J., dissenting) (citation omitted). Federal courts have no inherent power to order restitution – a criminal punishment unknown at common law, *see*

A. Campbell, *Law of Sentencing* § 3:3 (3rd ed. 2004) – absent statutory authorization.[7]

The district court's power to order restitution in this case was both provided and constrained by the provisions of the MVRA. *See* 18 U.S.C. § 3556 (providing that "court[s], in imposing a sentence on a defendant who has been found guilty of an offense shall order restitution in accordance with section 3663A" and that "[t]he procedures under section 3664 shall apply to all orders of restitution under this section"); *id.* § 3663A(d) ("An order of restitution under this section shall be issued and enforced in accordance with section 3664."). Once the district court sentences the defendant, the MVRA tethers the

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[7] *See, e.g.*, *United States v. Gilberg*, 75 F.3d 15, 22 (1st Cir. 1996) ("A federal court has no inherent authority to order restitution in a criminal case; it may do so only as expressly provided by statute."); *United States v. Bok*, 156 F.3d 157, 166 (2d Cir. 1998) ("It is well-established that a federal court may not order restitution except when authorized by statute."); *United States v. Akande*, 200 F.3d 136, 138 (3d Cir. 1999) ("We begin with the firmly established principle that federal courts may not order restitution in the absence of statutory authorization."); *United States v. Love*, 431 F.3d 477, 479 (5th Cir. 2005) ("A federal court cannot order restitution except when authorized by statute." (quotation marks omitted)), *cert. denied* 547 U.S. 1050 (2006); *United States v. Wells*, 177 F.3d 603, 608 (7th Cir. 1999) ("In fashioning a restitution order, a district court is therefore circumscribed by the substantive and procedural limitations outlined [in the governing statute]." (quotation marks omitted)); *United States v. Lomow*, 266 F.3d 1013, 1021 (9th Cir. 2001) ("[T]he district court does not have the inherent authority to order restitution."); *United States v. Mitchell*, 429 F.3d 952, 961 (10th Cir. 2005) ("Federal courts possess no inherent authority to order restitution, and may only do so as explicitly empowered by statute." (quotation marks omitted)).

court's authority to impose restitution to that date. In the usual case, the district court will impose restitution "when sentencing" the defendant. 18 U.S.C. § 3663A(a)(1). But if it does not, the mandatory-claims processing rule in section 3664(d)(5) requires that the Government obtain any restitution order during a period "not to exceed 90 days after sentencing." 18 U.S.C. § 3664(d)(5). Because the district court entered an untimely restitution order over petitioner's timely objection, that order is invalid.

A. The Plain Language Of Section 3664 Provides District Courts With The Authority To Order Restitution Only When Sentencing Defendants Or Within 90 Days Thereafter.

In cases involving statutory interpretation, this Court "look[s] first to the language of the statute itself." *Hughey v. United States*, 495 U.S. 411, 415 (1990) (applying this principle when interpreting a criminal restitution statute). In this case, the unambiguous language of the MVRA states that district courts have the power to enter orders of restitution only when sentencing a defendant or within 90 days after imposing sentence.

1. The MVRA unambiguously requires that an order of restitution be made when sentencing the defendant and provides a statutory deadline on the court's authority to order restitution. Section 3663A(a)(1) states that a court shall order restitution "*when sentencing* a defendant" convicted of specified

offenses. 18 U.S.C. § 3663A(a)(1) (emphasis added).[8] It does not authorize district courts to impose restitution orders at a time of their choosing.

Section 3664 sets out the "[p]rocedure for issuance and enforcement" of the restitutionary portion of a defendant's punishment, including a timeline based on the date a defendant is to be sentenced. Section 3664(d)(1) requires the Government to provide the probation officer with information related to the restitution determination "not later than 60 days prior to the date initially set for sentencing." Section 3664(a) requires the probation officer to provide that material to the court, along with other "information sufficient for the court to exercise its discretion in fashioning a restitution order." This is usually included as part of the presentence report, which is generally provided to the Government and the defendant "at least 35 days before sentencing." *See* Fed. R. Crim. P. 32(e)(2).

Section 3664 contemplates that the district court will impose restitution as part of the sentence itself. Courts are required to consider the amount of restitution in determining whether to impose probation or incarceration, and if the latter, the appropriate period of incarceration, *see* 18 U.S.C.

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[8] The Tenth Circuit construed the phrase "[n]otwithstanding any other provision of law" at the beginning of Section 3663A(a)(1) to somehow override all of the requirements in Section 3664, including the 90-day time limit in section 3664(d)(5). Pet. App. 10a. That construction makes no sense because it renders Section 3663A(d), which requires compliance with Section 3664, meaningless.

§ 3553(a)(7), and in setting the amount of any fine, *see* 18 U.S.C. § 3572(a)(4). Both of these determinations (imprisonment and fine) must be made at the time of sentencing, and not later. Indeed, AO 245B, the standard form provided by the Administrative Office of the U.S. Courts for Judgment in a Criminal Case, contains four pages devoted to specifying the amount, recipients, and schedule for restitution. *See* http://www.uscourts.gov/forms/ao245B.pdf.

Although the Government normally obtains a restitution order at the sentencing, Section 3664(d)(5) provides a sharply delimited extension. If the Government or the probation office concludes that "the victim's losses are not ascertainable by the date that is 10 days prior to sentencing," it must notify the court that it needs more time. The court, in turn, "shall set a date for final determination of the victim's losses, *not to exceed* 90 days after sentencing." 18 U.S.C. § 3664(d)(5) (emphasis added). This 90-day limit sets an outer boundary on the entry of restitution. The court lacks discretion to set a later date as part of the sentencing process. *See Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 35 (1998) (use of the word "shall" "normally creates an obligation impervious to judicial discretion").

2. The plain text reading of the 90-day deadline as a limit on district courts' sentencing power is reinforced by the good-cause amendment provision in the very next sentence of Section 3664(d)(5):

> If the victim subsequently discovers further losses, the victim shall have 60

> days after discovery of those losses in which to petition the court for an amended restitution order. Such order may be granted only upon a showing of good cause for the failure to include such losses in the initial claim for restitutionary relief.

The words "amended" and "subsequently" by definition assume a preexisting restitution order.[9] If courts retained unlimited power to order restitution at any time, as the court of appeals mistakenly held, then the good-cause amendment provision would be unnecessary. The court of appeals' reading thus flouts one of the "most basic interpretive canons that '[a] statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant.'" *Corley v. United States*, 129 S. Ct. 1558, 1566 (2009) (internal quotations omitted); *see also Flores-Figueroa v. United States*, 129 S. Ct. 1886, 1892 (2009) (courts "should not interpret a statute in a manner that makes some of its language superfluous").

Indeed, under the court of appeals' reading of the 90-day period as merely aspirational, the good-cause amendment provision – if it retains any significance at all – becomes perverse. The more dilatory the victim, the greater his opportunity for restitution. A victim who cooperates promptly with the probation

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[9] Similarly, the language of Section 3664(k), which gives courts the power to "adjust" the restitution schedule upon a change in the defendant's economic circumstances, also presupposes the existence of a previously imposed restitution order that can be adjusted.

office, and whose restitution is set either at sentencing or within the 90-day period, will be able to obtain additional restitution only if he can show good cause. By contrast, a victim whose nonfeasance makes it impossible for the court to comply with the 90-day deadline could be awarded full restitution via an initial restitution order imposed at any time. In this case, for example, had the Government sought restitution at the time of sentencing for the $80,000 medical bill of which it was then aware, *see* J.A. 35, the Government would have been able to seek the additional $25,000 in restitution it ultimately requested only by meeting two conditions. First, it would have had to file a motion for that amount no later than December 1, 2007, having learned of the additional claim no later than October 3. *See* J.A. 52. Second, in that motion it would have been required to have made a "showing of good cause for the failure to include such losses in the initial claim for restitutionary relief." 18 U.S.C. § 3664(d)(5). By contrast, the Government's dilatory pursuit of reimbursement here somehow enabled it to receive the full $105,000 while flouting both the 60-day and good cause requirements.

Moreover, if courts cannot amend a restitution order to increase a defendant's obligations absent "good cause" for delay, it makes no sense to permit courts to delay entry of any order at all without good cause, as the district court forthrightly indicated it did here. *See* J.A. 56 (noting in February 2008 that it had had the relevant information "back in October [2007]," and was "not sure why we're just getting together today"); Pet. App. 18a (stating that the question before the court was "what to do about

delay caused by the Government or district court, rather than by the defendant"). In *Carlisle v. United States*, 517 U.S. 416 (1996), this Court rejected an analogous construction of Fed. R. Crim. P. 29(c). In *Carlisle*, the district court entered a judgment of acquittal sua sponte even though the defendant had not timely filed his motion for acquittal notwithstanding the verdict. This Court rejected that outcome, finding it "would create an odd system in which defense counsel could move for judgment of acquittal for only seven days after the jury's discharge, but the court's power to enter such a judgment would linger." *Carlisle*, 517 U.S. at 423; *see also United States v. Smith*, 331 U.S. 469, 474 (1947) ("[I]t would be a strange rule which deprived a judge of power to do what was asked when the request was made by the person most concerned, and yet allowed him to act without petition."). Here, it would be equally strange if victims were not allowed to recover additional losses without complying with Section 3664(d)(5), but courts could award that amount in disregard of the 90-day limit. *Cf. Hollingsworth v. Perry*, 130 S. Ct. 705, 706 (2010) (per curiam) (explaining that "[c]ourts enforce the requirement of procedural regularity on others, and must follow those requirements themselves").

3. Section 3664(d)(5) is best understood as a mandatory rule for processing the Government's "initial claim for restitutionary relief." As a claims-processing rule, Section 3664(d)(5)'s 90-day limit cannot be disregarded by a court when properly invoked by a defendant.

In recent years, this Court has clarified that where statutes or court rules set clear time limits on a party's ability to seek relief from a court, adherence to those limits is mandatory. *See Eberhart v. United States*, 546 U.S. 12, 19 (2005) (per curiam) (reiterating the status of Fed. R. Crim. P. 45(b) as an "inflexible . . . demand for a definite end to proceedings").[10] In *Eberhart*, this Court stated that timelines in criminal procedure are "rigid," and "district courts must observe the clear limits of the Rules of Criminal Procedure when they are properly invoked." 546 U.S. at 17. Similarly, in *Kontrick v. Ryan*, 540 U.S. 443 (2004), the Court found that the time limits governing bankruptcy court proceedings "limit[] [the court's] discretion" and are "unalterable" when a party properly objects. *Id.* at 456.

Section 3664(d)(5) is a claims-processing statute. It places a series of responsibilities on the Government, the party that seeks a restitution order as part of a criminal sentence. Those responsibilities include providing information to the court by a fixed time, seeking an extension of time when necessary, and ultimately obtaining an order. For example, the Government must collect and provide to the court information regarding a victim's losses. *See* 18 U.S.C. §§ 3664(a), 3664(d)(1)-(2). It also must seek either a postponement of sentencing or an order under Section 3664(d)(5) setting the time for a final

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[10] Though the Tenth Circuit recognized that "[p]rocedures for processing claims and arguments are of course important, and respect for them may be mandatory in certain circumstances," Pet. App. 11a, once it had concluded that Section 3664(d)(5) was not jurisdictional in the narrow sense, it failed to analyze the 90-day time limit as a mandatory claims-processing rule.

determination of the victim's losses. Finally, the burden of proving the victim's loss "shall be on the attorney for the Government." 18 U.S.C. § 3664(e).

In this case, Section 3664(d)(5) told the Government that to obtain a restitution order as part of petitioner's sentence, it needed either to provide the information necessary in time for the sentencing itself or to seek a restitution order from the court within 90 days after the sentencing. The Government did neither, and as a result, no restitution order was entered during the time period provided by the statute. Because petitioner properly objected to the Government's untimely attempt to obtain restitution outside the statutory time period,[11] the court lacked power to enter that order.

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[11] Like other mandatory claims-processing rules, the 90-day limit in Section 3664(d)(5), under certain circumstances, may be subject to waiver or to tolling. *See, e.g., United States v. Cheal*, 389 F.3d 35, 48 (1st Cir. 2004) ("Where the defendant failed to object [to the order of restitution] below, we review only for plain error."); *United States v. Terlingo*, 327 F.3d 216, 222 (3d Cir. 2003) (permitting tolling "when the delay is caused in significant part by the defendant"); *United States v. Stevens*, 211 F.3d 1, 5 (2d Cir. 2000) (permitting tolling to take account of "the defendant's own purposeful misconduct"), *cert. denied sub nom. Gall v. United States*, 531 U.S. 1101 (2001).

Neither of those circumstances obtains in this case. Petitioner did not waive his objection to the untimely restitution. He timely objected in the district court, *see* J.A. 54, and preserved that claim on appeal. *See* Pet. App. 5a. Nor was the 90-day period tolled; as the Government conceded at the restitution hearing, "we're not claiming that the 90 days were tolled." J.A. 65. And, as both the district court and the court of appeals recognized, the failure to meet the 90-day deadline in this case was in no way attributable to petitioner. Pet. App. 18a; J.A. 56.

The court of appeals tried to distinguish Section 3664(d)(5) from other claims-processing rules by insisting that those rules "pertain[]" to "parties," whereas the MVRA pertains to a "public interest" – namely, providing restitution to victims. Pet. App. 15a. In this case, of course, the Government was seeking restitution only for itself – that is, for expenses incurred by the United States Department of Health and Human Service's Indian Health Service. J.A. 52. But even in cases where individual victims are the ultimate recipients of the restitution the Government obtains, this does not change the fact that the Government and the defendant are the only *parties* to the sentencing process.[12] The plain language of Section 3664 treats the Government as "the party" who bears the burden of proof on disputed questions regarding the amount of a victim's loss. 18 U.S.C. § 3664(e). This conclusion is reinforced by the fact that Section 3664(d)(5) hands off to the victim a right "to petition the court" on his behalf only to seek "amend[ment]" of a preexisting restitution order, *see supra* pp. 20-21. *See also* 18 U.S.C. § 3664(k) (permitting "any party" – which at this point is defined also to "include[e] the victim" – to petition the court to "adjust" the payment schedule). Thus although the MVRA authorizes the Government to seek restitution as part of a defendant's criminal sentence, it does not

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[12] Indeed, victims generally do not have standing to bring claims under the MVRA. *Cf. United States v. United Security Savings Bank*, 394 F.3d 564, 567 (8th Cir. 2004) (per curiam) (victim has no standing to challenge district court's decision on how to allocate restitution among victims).

fundamentally alter the structure of criminal sentencing.[13]

The 90-day rule's status as a mandatory claims-process rule is further reinforced by Congress's choice of more flexible language in other parts of Section 3664, including provisions regarding timing. Section 3664(k), for example, provides that a sentencing court "may . . . adjust the payment schedule" – but not increase the total amount to be paid – "on its own motion or the motion of any party" and can do so at any time "[u]pon recei[ving]" notice of a change in the defendant's economic circumstances. It sets no express deadline or time limit. Cf. *Lopez v. Davis*, 531 U.S. 230, 241 (2001) ("Congress' use of the permissive 'may' . . . contrasts with the legislators' use of a mandatory 'shall' in the

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[13] The court of appeals' heavy reliance on *United States v. Montalvo-Murillo*, 495 U.S. 711 (1990), *see* Pet. App. 13a-15a, fails to comprehend this point. The statute at issue in *Montalvo-Murillo* was the Bail Reform Act, not a claims-processing statute. The pretrial detention provisions of the Bail Reform Act establish a "regulatory device [designed] to assure the safety of persons in the community and to protect against the risk of flight." *Montalvo-Murillo*, 495 U.S. at 719-20. They were not "formulate[d] . . . as punishment." *United States v. Salerno*, 481 U.S. 739, 747 (1987). The specific provision at issue in *Montalvo-Murillo*, 18 U.S.C. § 3142(f), concerned the requirement that a suspect receive a determination at his "first appearance before [a] judicial officer" as to whether he should be detained pending trial.

The situation here is different. Restitution under Title 18 is punitive, not regulatory. *See Kelly v. Robinson*, 479 U.S. 36, 52-53 (1986). And Section 3664(d)(5) is intended to resolve "the final determination" of a defendant's criminal sentence, not to channel a preliminary inquiry.

very same section."). In three other subsections of Section 3664, Congress expressly provided that the Government should take actions "to the extent practicable." *See* 18 U.S.C. § 3664(a) ("report shall include, to the extent practicable, a complete accounting of the losses to each victim"); *id.* § 3664(d)(1) (Government shall consult with identified victims "to the extent practicable"); *id.* § 3664(d)(2) (probation officer shall provide notice and affidavit form "to the extent practicable"); *see also id.* § 3664(d)(4) (privacy of records filed or testimony taken shall be maintained "to the greatest extent possible"). By contrast, Section 3664(d)(5) sets a mandatory requirement involving a fixed number of days.

In this case, as the Tenth Circuit recognized, the "district court's restitution order was undoubtedly late, coming after the deadline prescribed by the Mandatory Victims Restitution Act." Pet. App. 5a. Because that deadline is a mandatory claims-processing rule, which petitioner timely invoked, the plain language of Section 3664(d)(5) barred the Government from obtaining a restitution order as part of petitioner's sentence.

B. The Final Judgment Rule Requires Treating Section 3664(d)(5) As A Limit On When Restitution Can Be Ordered.

The time limit in Section 3664(d)(5) functions to assure that the sentencing process reaches finality within a reasonable period. Allowing district courts to hold open that process beyond the 90 days provided would undermine the orderly administration of criminal justice. These problems

are avoidable because the MVRA sets out a sensible structure which can easily be followed.

1. The final judgment in a criminal case occupies a critical position. Federal law contemplates that all aspects of a defendant's punishment, including restitution, will be imposed in a single sentence, *see* 18 U.S.C. §§ 3551(b), 3554, 3556, and that that sentence will be embodied in a final judgment. *See* Fed. R. Crim. P. 32(k)(1) (requiring that the "judgment of conviction . . . must set forth" the "adjudication and the sentence"). In a criminal case, "a judgment or decision is final for the purpose of appeal only when it terminates the litigation between the parties on the merits of the case, and leaves nothing to be done but to enforce by execution what has been determined." *Parr v. United States*, 351 U.S. 513, 518 (1956) (quotation marks omitted). As this Court recently reiterated, "[f]inal judgment in a criminal case means sentence. The sentence is the judgment." *Burton v. Stewart*, 549 U.S. 147, 156 (2007) (quoting *Berman v. United States*, 302 U.S. 211, 212 (1937)).

Without a final judgment, a defendant cannot appeal either his conviction or any component of the punishment imposed. *See* Fed. R. App. P. 4(b). As this Court has repeatedly emphasized, "[f]inality as a condition of review" has long been applied with special force in criminal cases. *Flanagan v. United States*, 465 U.S. 259, 263-64 (1984) (quoting *Cobbledick v. United States*, 309 U.S. 323, 324 (1940)).

Restitution under the MVRA must be understood in light of these principles. As such, restitution must

be determined – either by the court or by operation of law – before the sentence is complete and judgment becomes final. Section 3664(d)(5) tells the court to complete sentencing by determining restitution within 90 days. If the court does so, it will produce a final judgment which can be appealed. *See* 18 U.S.C. § 3664(*o*) (describing "a sentence that imposes an order of restitution" as the "final judgment"). If the court does not do so, expiration of the 90-day limit will render final any sentence already pronounced.

Any other reading produces constitutional difficulties. As a matter of due process, preventing a defendant from appealing his conviction and sentence for a substantial amount of time "might raise constitutional problems of significant proportions." *Corey v. United States*, 375 U.S. 169 (1963). But that is what would happen under the Tenth Circuit's "better-late-than-never principle." Pet. App. 13a. Under that principle, a judgment in a criminal case can leave restitution outstanding, and thus not become final, for an indefinite period. In this case, for example, petitioner had spent 19 months in custody, and was on supervised release, by the time the district court eventually purported to make a "final determination." Consider a defendant identical to petitioner in all respects except for the fact that the defendant had contested either his guilt or the length of his sentence. That defendant would have been precluded from appealing by the Tenth Circuit's rule until he had served nearly all his time.

Thus, to avoid constitutional difficulties, Section 3664(d)(5) must be read to set a mandatory 90-day deadline. That reading avoids constitutional

difficulty because any judgment entered in an MVRA case becomes final no later than 90 days after sentencing regardless of whether restitution has been ordered. Thus, at worst, the defendant's ability to appeal would be postponed only for a short time.

Trying to cure the constitutional difficulty by permitting appeals from conviction or from other parts of a defendant's sentence while restitution remains outstanding runs afoul of the strong rule against piecemeal litigation. At best, the court of appeals will be entertaining the defendant's appeal on his conviction or sentence while the district court is adjudicating the restitution claim. Should the defendant or the Government disagree with the district court's restitution determination, this will produce a second appeal. "[C]ourts have consistently given effect" to the "congressional policy against interlocutory or 'piecemeal' appeals" for as long as criminal "appeals of right have been authorized." *Abney v. United States*, 431 U.S. 651, 656 (1977).

More likely, because restitution is not collateral to the sentence, when the defendant files an appeal challenging his conviction or term of imprisonment, the district court will lose jurisdiction over the case. *Griggs v. Provident Consumer Disc. Co.*, 459 U.S. 56, 58 (1982) ("The filing of a notice of appeal is an event of jurisdictional significance – it confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal.") As such, restitution cannot be ordered until that appeal is resolved, which may take many months or even years. During that entire time period, of course, the victim has no prospect of

receiving a restitution award. And after that delay, the piecemeal appeal problem remains: if restitution is ordered, the defendant (and the Government) will then have the right to file a second appeal regarding the restitution order. As this Court has noted:

> [J]udicial administration must not be leaden-footed. Its momentum would be arrested by permitting separate reviews of the component elements in a unified cause. These considerations of policy are especially compelling in the administration of criminal justice. . . . *[E]ncouragement of delay is fatal to the vindication of the criminal law.*

Cobbledick, 309 U.S. 323 at 325 (1940) (emphasis added). Contrary to the Tenth Circuit's hypothesis, later is *not* better in the realm of criminal justice.

Finally, the "better-late-than-never" rule produces problems for the administration of corrections as well as for judicial administration. The judgment not only sets out the sentence, but also marks the point at which a defendant who is sentenced to imprisonment is committed to the custody of the United States Bureau of Prisons. A federal prisoner is often sent to a correctional facility far away from the courthouse where he was sentenced. *See* 18 U.S.C. § 3621(b) (BOP may designate any "appropriate and suitable" institution). Because the defendant's presence is required for additional restitution proceedings, *see* Fed. R. Crim. P. 43(a)(3), the commitment either cannot occur, or, if it does, the defendant will have to be transported back to the sentencing jurisdiction, interrupting any

correctional treatment that the court has recommended or ordered. *Cf.* J.A. 38 (recommending that petitioner participate in the BOP's drug and alcohol treatment program).

2. These problems are avoided by a plain text reading of Section 3664(d)(5)'s 90-day rule as mandatory. Such a reading, moreover, fits easily within the existing structure of criminal sentencing.

First, if the Government has provided the court with sufficient information about the victim's losses, the clear language of Section 3663A(a)(1) requires that the restitution be ordered "when sentencing." Following that sentencing in open court, the district court enters a judgment on the docket and the sentence becomes final.[14]

Second, if the Government does not have sufficient information regarding the victim's losses prior to sentencing, it has two options. It can move to postpone the entire sentencing process for a reasonable time in order to obtain the information. (As this case shows, the Government often moves to postpone sentencing, for a variety of reasons, JA 28-29.) Or, under Section 3664(d)(5), the Government or the probation officer must notify the court of the

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[14] If the court refuses to enter restitution as part of the sentence, the Government can either move to correct the sentence under Fed. R. Crim. P. 35(c), or appeal pursuant to 18 U.S.C. § 3742(b)(1), on the grounds that the sentence omitting the required restitution is a sentence "in violation of law." But if the Government does not appeal, then the judgment becomes final regardless of any congressional directive that restitution be "mandatory." *See Greenlaw v. United States*, 128 S. Ct. 2559, 2562 (2008).

problem at least ten days prior to sentencing. Following that notification, the court shall "set a date for the final determination" of restitution "not to exceed 90 days after sentencing."[15]

At the initial sentencing, the court will pronounce the other aspects of the defendant's punishment, such as imprisonment, probation, special conditions of release, and the like. The Government must then provide the court with information necessary to impose restitution before the final-determination date set pursuant to Section 3664(d)(5). At that final sentencing, the court will pronounce restitution (and could revise any other aspects of the sentence that were interrelated with the restitution, *see* 18 U.S.C. §§ 3553(a)(7), 3572(a)(4)). Having done so, it should then enter final judgment. This need to determine the entire sentence before entering judgment explains why the wisest course is "not to enter the written judgment of conviction until the amount of restitution has been fixed." *United States v. Kapelushnik*, 306 F.3d 1090, 1094 (11th Cir. 2002).

If, as in this case, the district court has entered judgment before considering restitution, *see* J.A. 42, then it needs to amend that judgment once it has made a "final determination." An already-entered

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[15] If the Government has some (albeit incomplete) information regarding the amount of restitution, it could ask the court to go forward with sentencing and to enter a final judgment based on the materials then before it. Section 3664(d)(5)'s good-cause amendment provision could then come into play if the victim later discovers additional losses. *Cf.* 18 U.S.C. § 3664(*o*)(1)(C) (treating sentences that include a restitution order as final even though they can be amended for good cause).

judgment that was not final at the time it was entered because restitution was undetermined, however, automatically becomes final once the 90-day period provided by Section 3664(d)(5) expires. At that point, there is "nothing to be done," *Parr v. United States*, 351 U.S. 513, 518 (1956), because the district court has no statutory authority to order restitution.

If the court does not set a final-determination date, the Government, as the party seeking restitution, should ask the court to do so by filing a motion (just as any party requesting court action would do). If the Government does not do so and the date is never set by the court, when the 90 days runs, as it did here, the court loses authorization to impose restitution.[16]

What the Government cannot do, however, is sit idly by while the time to impose restitution expires – and the sentence becomes final – and then obtain an additional criminal penalty months or even years after sentencing. In this case, petitioner was sentenced in July 2007, the time for seeking a final determination of restitution expired in October 2007,

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[16] If the Government files a motion asking the court to set a date but the court fails to do so, the Government can seek mandamus. *Cf. United States v. Dooling*, 406 F.2d 192, 198 (2d Cir. 1969) (recognizing the Government's ability to seek mandamus ordering the trial court to enter judgment), *cert. denied sub nom. Persico v. United States*, 395 U.S. 911 (1969). The 90-day period would then be tolled. There could also be tolling if the Government had to seek mandamus because a court, despite having set a date and having received all necessary information from the Government, has failed to issue a timely restitution decision.

and it was not until April 2008, when petitioner was already "back at the reservation," J.A. 71, that the Government obtained the order that he pay it over $100,000.

In short, the criminal sentencing process has always been designed to produce a single judgment of conviction and sentence. Treating Section 3664(d)(5) as a mandatory limit on a district court's authority to impose restitution is the only way to harmonize the MVRA with this important principle.

C. Treating Section 3664(d)(5)'s 90-Day Deadline As Mandatory Best Fulfills The Purposes Of The MVRA.

Congress imposed a 90-day limit on the district court's power to enter restitution as a criminal penalty for three interrelated reasons. That deadline safeguards judicial resources, respects the defendant's rights, and protects victims' interests.

1. Congress did not intend to create a stand-alone, drawn-out restitution process. Indeed, the legislative history shows that Congress was "not unmindful of the costs to the justice system" produced by adding a duty of determining restitution to the workload of already busy district courts. S. Rep. No. 104-179, at 18 (1995). This concern is illustrated by the MVRA's provision that otherwise-mandatory restitution need not be imposed in cases involving a range of property crimes if the court finds either that "the number of identifiable victims is so large as to make restitution impracticable," 18 U.S.C. § 3663A(c)(3)(A), or if the court decides that "complex issues" would "complicate or prolong the sentencing process to a degree that the need to

provide restitution to any victim is outweighed by the burden on the sentencing process," *id.* § 3663A(c)(3)(B). Moreover, Congress intentionally incorporated procedures "streamlining the process for issuing and enforcing" orders of restitution, S. Rep. No. 104-179, at 18, into the preexisting criminal sentencing process.

2. Congress chose to use the criminal sentencing process because it already provides protection for a defendant's constitutional interests. The legislative history expressly makes clear that "the issuance of a restitution order is an integral part of the sentencing process that is to be governed by the same, but no greater, procedural protections as the rest of the sentencing process." S. Rep. No. 104-179, at 20.

The procedures provided by Section 3664 are designed to "protect[] the rights of *all* individuals," S. Rep. No. 104-179, at 21 (emphasis added), including, of course, defendants. That is why Congress emphasized that "the need for finality and certainty in the sentencing process dictates that [the restitution] decision be made quickly." *Id.* at 20. Congress recognized that defendants have a due process "right not to be sentenced on the basis of invalid premises or inaccurate information." *Id.* Section 3664(d)(5)'s time limits protect that interest. Like a statute of limitations, the 90-day limit protects a defendant from the "[p]assage of time . . . [which] may impair memories, cause evidence to be lost, deprive the defendant of witnesses, and otherwise interfere with the ability to defend himself." *United States v. Marion*, 404 U.S. 307, 321 (1971). The same concerns apply to a defendant's

ability to rebut the Government's claim that a particular loss is attributable to his actions. Moreover, if restitution drags on long after the rest of a criminal case is over, this may pose special problems for defendants who have been transported to a prison on the other side of the country and who cannot contact or assist their lawyers in mounting a defense.

The Tenth Circuit misunderstood the statement in the legislative history on which it relied. Congress immediately followed the statement that the "sole due process interest of the defendant being protected during the sentencing phase is the right not to be sentenced on the basis of invalid premises or inaccurate information," Pet. App. 16a, with the assertion that "the provisions of this Act," S. Rep. 104-179, at 20, would provide adequate protection. Those protective provisions include the time limits set out in Section 3664(d)(5), which Congress assumed the Government and courts would follow.

3. Moreover, the deadline that Congress set in the MVRA best serves the policy goal of expediting victim compensation. Over the long run, the Tenth Circuit's "better-late-than-never principle" would not actually benefit victims. Instead, by removing any consequences from a court's failure to comply with the 90-day deadline, it will actually *delay* the prompt entry of restitution orders and work to the detriment of victims. *Cf. Toussie v. United States*, 397 U.S. 112, 115 (1970) (noting that statutes of limitations for crimes have the "salutary effect of encouraging law enforcement officials promptly to investigate suspected criminal activity"). If it does not matter

when a restitution hearing is held and an order is entered, resolution of restitution claims may end up being postponed while district courts and prosecutors turn to other issues that seem more pressing. That is precisely, after all, what seems to have happened in this case. Neither the Government nor the district court paid sufficient attention to the requirement for speedy resolution of the Indian Health Service's claim for restitution.

In fact, to the extent that restitution under the MVRA serves as a substitute for the civil action that a victim would otherwise have to pursue to obtain restitution, delay in pursuing and obtaining restitution may force victims to file protective civil lawsuits. This result will not only cost victims time and resources, but will impose additional burdens on the courts in which such lawsuits are filed.

By creating a strong incentive for the Government to proceed expeditiously, treating the MVRA's 90-day deadline as mandatory best implements the balance Congress struck.

D. If Any Statutory Ambiguity Remains, The Rule Of Lenity Requires Treating The 90-Day Deadline As A Limit On The District Court's Sentencing Power.

Section 3664(d)(5) is not ambiguous. But if it were, the rule of lenity would require treating the 90-day provision as a limit on the district court's power.

Because the MVRA, like other criminal restitution provisions, is a penal statute, *see Kelly v. Robinson*, 479 U.S. 36, 52-53 (1986), the rule of lenity requires resolving any ambiguity regarding the

construction of Section 3664(d)(5) in favor of defendants. As Chief Justice Marshall explained in *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76 (1820), which this Court recently characterized as its "seminal rule-of-lenity decision," *United States v. Santos*, 128 S. Ct. 2020, 2026 (2008), "[p]robability is not a guide which a court, in construing a penal statute, can safely take." *Wiltberger*, 18 U.S. (5 Wheat.) at 105.

But rather than applying lenity, the court of appeals applied the forgiving approach taken to time limits in a variety of regulatory statutes. Pet. App. 12a-15a. It ignored the fact that the rule of lenity does not apply in those cases. Their holdings, therefore, cannot be incorporated mechanically into the criminal sentencing context.

Perhaps as a result of this error, the court engaged in a free-ranging policy analysis. As a result, despite recognizing that the district court's restitution order "was undoubtedly late, coming after the deadline prescribed by the Mandatory Victims Restitution Act," Pet. App. 5a, it acted as if the words "mandatory" and "nothwithstanding" overrode every other word of the statute, including the specific time deadlines set in Section 3664(d)(5). Pet. App. 9a, 11a. The court also selectively plucked phrases out of the legislative history to buttress its decision to override Section 3664(d)(5)'s 90-day limit. Pet. App. 16a-17a.

This Court has already rejected, on the basis of lenity, similar policy and legislative history arguments in a closely analogous restitution case. In *Hughey v. United States*, 495 U.S. 411, 412-13

(1990), the Court addressed restitution under the Victim and Witness Protection Act, the predecessor to the MVRA. The question presented was whether a defendant charged with multiple offenses but convicted of only one could be required to make restitution for losses related to the other alleged offenses. The Government argued that the statute's purpose as identified in text and legislative history, as well as general policy concerns, supported upholding the district court's broad restitution order. *Id.* at 420. This Court refused to even consider that argument, finding that "longstanding principles of lenity . . . preclude our resolution of ambiguity against [the defendant] on the basis of general declarations of policy in the statute and legislative history." *Id.* at 421 (citations omitted).

Even if this Court were not to accept petitioner's plain language and structural arguments, at most it would be left with ambiguity as to whether district courts have the power to enter a restitution order that fails to comply with the 90-day time limit. The same longstanding principles of lenity that were dispositive in *Hughey* would be dispositive here. They would require holding that Section 3664(d)(5) creates a mandatory deadline.

II. THE ILLEGAL SENTENCE IMPOSED IN THIS CASE MUST BE REVERSED.

In its Brief in Opposition, the Government did not seriously contest the fact that out-of-time restitution orders constitute error. Instead, it framed the inquiry as whether violations of Section 3664(d)(5) constitute "prejudicial error." BIO i. They

do. Because an illegal sentence always affects substantial rights, its imposition cannot be harmless. Therefore, a defendant who timely objects to the imposition of such a sentence is entitled to have it reversed. This is particularly true in cases like this one, where the sentence is illegal because punishment was imposed outside of statutory time limits and after the August 8, 2007, judgment became final as a matter of law.

1. As an initial matter, it is important to be clear exactly which of the district court's errors is before this Court. It is *not* the district court's failure in the fall of 2007 to impose a restitution order required by the MVRA. Rather, the error before this Court consists only of the district court's later error in the spring of 2008: imposing restitution in violation of Section 3664(d)(5).

To be sure, in light of Section 3663A(a)(1), the district court erred in failing to order restitution either "when sentencing" petitioner or within the 90-day period provided in Section 3664(d)(5). The Government could have prevented that error had it filed a motion asking the district court to enter a timely restitution order. *See supra* p. 35. It did not do so. In fact, it completely dropped the ball, doing nothing until the district court – on its own motion, six months after the sentencing – ordered a restitution hearing. It cannot appeal that error now.

The district court's April 24, 2008, restitution order came too late to cure an error that became final on October 28, 2007. The Government cannot now use the fact that petitioner later filed a timely appeal – not from his sentence, but from the illegal

restitution order – as a vehicle to obtain relief it did not timely seek. *Cf. Greenlaw v. United States*, 128 S. Ct. 2559, 2569 (2008) ("The strict time limits on notices of appeal and cross-appeal would be undermined, in both civil and criminal cases, if an appeals court could modify a judgment in favor of a party who filed no notice of appeal.").

Having failed to impose restitution within the statutory time period, the district court committed a second and separate error when it entered a restitution order at a time when it lacked statutory authorization to do so. To this illegal order, petitioner made a timely objection and, when his objection was rejected by the district court, filed a timely appeal. Like the court of appeals, this Court has jurisdiction only to address the district court's second error.

2. The court's entry of a restitution order outside of the time allowed by statute was prejudicial and must be reversed. An error that "affect[s] . . . the sentence imposed," *Williams v. United States*, 503 U.S. 193, 203 (1992), requires reversal as it by definition "affect[s]" a defendant's "substantial rights." Fed. R. Crim. P. 52(a). *See also Puckett v. United States*, 129 S. Ct. 1423, 1433 n.4 (2009) ("When the rights acquired by the defendant relate to sentencing, the 'outcome' he must show to have been affected is his sentence."). Here, the court's error dramatically affected the sentence petitioner received: the district court ordered, absent any statutory authority, that petitioner pay more than $100,000. *See United States v. Randle*, 324 F.3d 550, 558 (7th Cir. 2003) ("In requiring Randle to pay

several thousand dollars in restitution, without a statutory basis for doing so, the error affects Randle's substantial rights."); *United States v. Ubakanma*, 215 F.3d 421, 428-29 (4th Cir. 2000) (same).

Illegal sentences are "routinely corrected" even where a defendant has failed to timely object. *United States v. Pawlinski*, 374 F.3d 536, 541 (2004) (Posner, J.) (reversing sentence that required payment of restitution to non-victim and thus overstepped statutory authority); *see also, e.g.*, *United States v. Wainwright*, 938 F.2d 1096, 1097-98 (10th Cir. 1991) (vacating restitution order, despite lack of objection below, for conduct unrelated to offense of conviction).[17] *A fortiori,* when a defendant has timely objected, as petitioner did here, an illegal sentence cannot be treated as harmless.

The court of appeals' assumption that the error here was not prejudicial, *see* Pet. App. 21a, *cf.* BIO 7-9, rested on its conflation of the error properly before it and the earlier error. By the time the district court acted in this case, *only* its wrongful disregard of Section 3664(d)(5) enabled it to impose restitution. *See* J.A. 64 (arguing that ordering restitution out of the time period "in and of itself, is prejudice").

An example clarifies this point. Suppose that a district court were to erroneously impose a five-year

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[17] The few courts of appeals that have held otherwise in cases analogous to this one, *see, e.g.*, *United States v. Douglas*, 525 F.3d 225, 252-53 (2d Cir.), *cert. denied* 129 S. Ct. 619 (2008); *United States v. Cienfuegos*, 462 F.3d 1160, 1162-63 (9th Cir. 2006), have mistakenly failed to recognize that entry by the court of a criminal sentence absent statutory authorization cannot be treated as simply an error of timing.

sentence in a case where the mandatory minimum sentence required by statute is ten years. Several years later, the court on its own initiative issues an order resentencing the defendant to ten years' imprisonment. If the defendant timely appeals from this second sentencing order, the court of appeals could not affirm the ten-year sentence by invoking harmless error analysis on the theory that the district court *could* have imposed the ten year sentence the first time around. The two errors do not cancel one another out.[18]

Likewise, the outcome in this case is an illegal sentence, and the fact that there was a time when a sentence just like it would have been legal is irrelevant. After Section 3664(d)(5)'s 90-day time limit had run, the court's later unauthorized imposition of restitution upon petitioner was unlawful, and absent this unlawful conduct,

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[18] This confusion may also explain the court of appeals' mistaken reliance on *United States v. Montalvo-Murillo*, 495 U.S. 711 (1990). Pet. App. 13a-15a. The error in *Montalvo-Murillo* was that the court did not make a prompt determination of whether Montalvo-Murillo should be detained. Montalvo-Murillo did not ask for a prompt determination; instead, he asked for (and received from the district court) an outright release from custody. This Court held that that remedy was inappropriate because it had "neither causal nor proportional relation" to the injury he had suffered. *See Montalvo-Murillo*, 495 U.S. at 721-22.

By contrast, the error from which petitioner appealed in this case – imposition of an illegal sentence – can be relieved only by reversing that sentence and thus is narrowly "tailored to the injury suffered." *Id.* at 721-22 (citing *United States v. Morrison*, 449 U.S. 361, 364 (1981)).

petitioner would not now be subject to a restitution order. The error here was not harmless.

3. This conclusion is reinforced by the general rule that violations of statutory time periods in criminal cases are not subject to harmless-error review. Petitioner is unaware of any limitations period in a criminal statute whose violation is ignored on the grounds that, had the time limit been observed, the Government could have obtained the same end result. Statutes of limitation "are established to cut off rights, justifiable or not, that might otherwise be asserted and they must be strictly adhered to by the judiciary." *Kavanagh v. Noble*, 332 U.S. 535, 539 (1947). As this Court explained in *United States v. Marion*, 404 U.S. 307, 322 (1971), statutes of limitations "specif[y] a limit beyond which there is an irrebuttable presumption" of prejudice. *See also McIver v. Ragan*, 15 U.S. (2 Wheat.) 25, 30 (1817) (Marshall, C.J.) (courts cannot "insert in the statute of limitations[] an exception which the statute does not contain").

Nor does the harmless-error rule apply to Speedy Trial Act violations. If a defendant is not brought to trial within the period authorized by the Act, the indictment must be dismissed. 18 U.S.C. § 3162(a)(2). To be sure, Congress has softened the consequences of this dismissal somewhat, by providing that dismissals of *indictments* can be either with or without prejudice. *Id.* But if a district court were to erroneously deny a defendant's motion to dismiss the indictment and then proceed to trial, the ensuing *conviction* must be reversed without regard to whether the defendant was prejudiced. As

this Court declared in *Zedner v. United States*, 547 U.S. 489, 509 (2006), "harmless error review is not appropriate." If a defendant properly objects to an untimely prosecution, his conviction will be reversed. The fact that Congress crafted a remedy in Speedy Trial Act cases that leaves open the possibility of a new proceeding, while not including an equivalent option within the MVRA, shows that the ordinary principle controls: entry of an illegal, untimely restitution order requires reversal.

This Court, more generally, does not require a showing of prejudice before providing "relief to a party properly raising" mandatory timelines contained in the Federal Rules of Criminal Procedure. *Eberhart v. United States*, 546 U.S. 12, 19 (2005) (per curiam). In *Carlisle v. United States*, 517 U.S. 416, 418 (1996), for example, the United States argued that the defendant's day-late motion for post-verdict acquittal was untimely and this Court agreed. The Court did not consider whether the Government was somehow disadvantaged before reversing the judgment in the defendant's favor. Defendants are entitled to invoke the same principle. *Cf. State v. Moen*, 919 P.2d 69, 76 (Wash. 1996) (rejecting state's contention that failure to comply with statutory time limit for restitution award was harmless).

4. If Congress had meant for courts of appeals to ask in each case whether a district court's restitution order came so late as to prejudice the defendant, it would have crafted a very different statute. That statute would simply have directed district courts to order restitution "within a reasonable time after

sentencing." Instead, Congress set a specific deadline.

To apply harmless-error analysis to that deadline would override a statutory limitations period in favor of a common-law laches approach, which has never been appropriate in criminal cases. There is no doubt that *at some point* the Constitution would prohibit a court's imposing restitution as part of a criminal sentence entered long ago.[19] To paraphrase this Court in *Carlisle*, the issue comes down to "nothing more cosmic than the question of timing – which we find answered by the text" – here, of the MVRA. *Carlisle*, 517 U.S. at 430-31. Where Congress has crafted a clear rule regarding criminal sentencing, there is no reason to undermine the certainty it provides to defendants, the judicial process, and victims.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be reversed.

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[19] Taken to its logical endpoint, the "better-late-than-never principle" violates the "constitutional prohibition against successive punishments for the same offense." *Dep't of Revenue of Mont. v. Kurth Ranch*, 511 U.S. 767, 769 (1994). This Court's double jeopardy jurisprudence makes clear that if restitution is not ordered before the defendant completes the portions of his punishment that were imposed earlier, the court's "power to punish for that offense [is] at an end." *Ex parte Lange*, 85 U.S. 163, 176 (1847).

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RESPONDENT'S BRIEF

No. 09-367

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In the Supreme Court of the United States

BRIAN RUSSELL DOLAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

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QUESTION PRESENTED

When a crime victim is entitled to restitution but the victim's loss is not ascertainable at least ten days before the defendant's sentencing, 18 U.S.C. 3664(d)(5) provides that "the court shall set a date for the final determination of the victim's losses, not to exceed 90 days after sentencing." The question presented is:

Whether a district court's failure to calculate restitution within 90 days after sentencing deprives the court of any authority to award restitution under 18 U.S.C. 3663A, which provides that "the court shall order * * * that the defendant make restitution to the victim of the offense."

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BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The order of the court of appeals granting panel rehearing in part (Pet. App. 1a-3a) is unreported. The amended opinion of the court of appeals (Pet. App. 4a-26a) is reported at 571 F.3d 1022. The opinion and order of the district court (Pet. App. 27a-48a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 27, 2009. A petition for rehearing was granted in part on June 26, 2009 (Pet. App. 1a-3a). The petition for a writ of certiorari was filed on September 23, 2009, and was granted on January 8, 2010. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Pertinent statutory provisions are set forth in an appendix to this brief. App., *infra*, 1a-18a.

STATEMENT

Following a guilty plea in the United States District Court for the District of New Mexico, petitioner was convicted of assault resulting in serious bodily injury, in violation of 18 U.S.C. 113(a)(6) and 1153. He was sentenced to 21 months of imprisonment, to be followed by three years of supervised release, and was ordered to pay $104,649.78 in restitution. The court of appeals affirmed. Pet. App. 4a-26a.

1. On September 9, 2006, petitioner picked up Evan Tissnolthtos, a hitchhiker, on an Indian reservation in southeastern New Mexico. The two men began to argue, and petitioner assaulted Tissnolthtos, leaving him on the side of the road, bleeding and unconscious. A police officer discovered Tissnolthtos, and he was airlifted to a hospital. Tissnolthtos sustained serious injuries, including a broken nose, wrist, leg, and ribs. His injuries required a lengthy hospital stay that included multiple surgeries, resulting in medical bills exceeding $100,000. Pet. App. 5a-7a, 28a-29a; J.A. 22-23.

2. A grand jury in the District of New Mexico returned an indictment charging petitioner with assault resulting in serious bodily injury, in violation of 18 U.S.C. 113(a)(6) and 1153. Pet. App. 6a. Petitioner pleaded guilty. *Ibid.* In his plea agreement, petitioner acknowledged that his sentence could include "restitution as * * * ordered by the Court." J.A. 18.

Before sentencing, the probation office prepared a presentence report (PSR) that noted that the Mandatory Victims Restitution Act of 1996 (MVRA), Pub. L.

No. 104-132, Tit. II, Subtit. A, 110 Stat. 1227, "is applicable to this case." J.A. 27. The MVRA makes restitution to victims mandatory for specified crimes, including crimes of violence and certain offenses against property. See 18 U.S.C. 3663A(c) (identifying offenses to which the MVRA applies). It provides that, "[n]otwithstanding any other provision of law, when sentencing a defendant convicted of" an offense covered by the statute, the district court "shall order * * * that the defendant make restitution to the victim of the offense." 18 U.S.C. 3663A(a)(1). Accordingly, the PSR stated that the MVRA "requires the Court to enter a restitution order." J.A. 25. The PSR detailed Tissnolthtos's extensive injuries, including his need for future surgery, and indicated that Tissnolthos would attempt to document his claim of $7000 in lost wages. J.A. 26-27. The PSR also explained that the probation office was still trying to obtain information from the Indian Health Service about Tissnolthtos's total medical costs, and stated that the office would forward the information to the court upon receipt. J.A. 27.

The district court held petitioner's sentencing hearing on July 30, 2007. J.A. 31. At the hearing, the court raised the issue of restitution, and the government informed the court that it was trying to locate the victim, and that "there is a bill of $80,000 that's still outstanding from the hospital." J.A. 35. Under the MVRA, "[i]f the victim's losses are not ascertainable by the date that is 10 days prior to sentencing, the attorney for the Government or the probation officer shall so inform the court, and the court shall set a date for the final determination of the victim's losses, not to exceed 90 days after sentencing." 18 U.S.C. 3664(d)(5). The government therefore suggested that the district court allow "90 more

days for restitution." J.A. 35. The district court agreed to "leav[e] the question of restitution open-ended because we don't have a good number at this point." *Ibid.* In imposing sentence, the district court noted that "restitution is applicable," but explained that it would leave the issue "open, pending the receipt of additional information." J.A. 39-40. The court advised petitioner that he should "anticipate that such an award will be made in the future." J.A. 40.

The district court entered judgment the same day. J.A. 3. The judgment stated that "[p]ursuant to the Mandatory Restitution Act, restitution is applicable; however, no information has been received regarding possible restitution payments that may be owed. Therefore, the Court will not order restitution at this time." J.A. 49.

On October 5, 2007, the probation office issued an addendum to the PSR, stating it had "received additional information regarding requested restitution in this matter," namely, that "[t]he cost of [Tissnolthtos's] medical care and treatment totaled $105,559.78." J.A. 52. The addendum noted that Section 3664(d)(5) required the court to "set a date for the final determination of the victim's losses, not to exceed 90 days after sentencing, which in this case shall be October 28, 2007." *Ibid.*

The district court did not hold a hearing on restitution until February 2008. J.A. 53-57. At the hearing, petitioner suggested that the district court no longer had authority to order restitution because more than 90 days had elapsed since sentencing. J.A. 54-55. The district court ordered supplemental briefing on that question, J.A. 56-57, and it then held a second restitution hearing. At that hearing, defense counsel conceded that

petitioner had notice of the restitution amount within the 90-day period, adding that "[w]e always knew restitution would be an issue." J.A. 64.

On April 24, 2008, the district court entered a memorandum opinion and order in which it held that it still had the authority to issue a restitution order, notwithstanding the expiration of the 90-day period. Pet. App. 27a-48a. In reaching that conclusion, the court emphasized that "restitution is mandatory for crimes of violence" and that "Congress intended Section 3664(d)(5) to protect victims." *Id.* at 44a-45a. It also noted that petitioner had "received the functional equivalent of statutory notice" and was "unable to demonstrate prejudice" from the delay in ordering restitution. *Id.* at 45a. The district court ordered petitioner to pay restitution of $104,649.78 in nominal periodic payments of $250. *Id.* at 47a.[1]

3. The court of appeals affirmed. Pet. App. 4a-26a. Petitioner argued "that the 90-day deadline set by [Section] 3664(d)(5) is jurisdictional" and that the district court's power to order restitution "expired 90 days after * * * sentencing." *Id.* at 9a. The court of appeals rejected that argument, noting that Section 3663A(a)(1) provides that, "*[n]otwithstanding any other provision of law,* when sentencing a defendant convicted of [an offense covered by the Act], the court *shall* order . . . restitution." *Ibid.* (quoting 18 U.S.C. 3663A(a)(1)) (brackets and emphasis in original). In enacting that provision, the court explained, "Congress * * * decided that defendants who have committed certain offenses should *never* be able to avoid restitution." *Id.* at

[1] The restitution award was equal to the costs calculated in the addendum to the PSR, as corrected for certain mathematical errors identified by the district court. J.A. 54.

9a-10a. Accordingly, "while the 90-day deadline is surely a command of the Act, it can be reasonably understood only as a subsidiary command to the Act's primary and overriding directive that restitution *must* be ordered for certain crimes." *Id.* at 10a. The court concluded that "Congress did not intend to divest the district court of all power over restitution awards after 90 days." *Id.* at 11a. Section 3664(d)(5), the court held, established a "claims processing procedure" that was intended to "ensur[e] the timely completion of * * * statutory obligations to the public," not to restrict "federal court subject matter jurisdiction." *Id.* at 11a, 13a.

In reaching that conclusion, the court of appeals distinguished between mandatory deadlines for litigants, such as the deadline for filing a notice of appeal, and "mandatory obligations on government officials to perform duties on behalf of the public." Pet. App. 15a. With respect to the latter category of obligations, the court concluded that the failure to perform as Congress intended did not eliminate the obligation itself, observing that "[i]t would be a strange thing indeed if a bureaucracy or court could avoid a congressional mandate by unlawful delay." *Id.* at 13a. The court found it unnecessary to consider what remedy might be appropriate if a defendant could establish prejudice from delay, noting that petitioner "does not purport to identify any way in which his substantial rights were infringed by the district court's decision requiring him to pay restitution later rather than sooner." *Id.* at 21a.

SUMMARY OF ARGUMENT

The Mandatory Victims Restitution Act of 1996, Pub. L. No. 104-132, Tit. II, Subtit. A, 110 Stat. 1227, provides that "[n]otwithstanding any other provision of law,

when sentencing a defendant convicted of" an offense covered by the statute, the district court "shall order * * * that the defendant make restitution to the victim of the offense." 18 U.S.C. 3663A(a)(1). The statute directs that if the victim's losses are not ascertainable before the defendant is sentenced, "the court shall set a date for the final determination of the victim's losses, not to exceed 90 days after sentencing." 18 U.S.C. 3664(d)(5). The court of appeals correctly held that a district court does not lose its authority to order restitution simply because it fails to determine the amount of the victim's losses before that 90-day period elapses.

Petitioner asserts that, under Section 3664(d)(5), the district court's delay should relieve him of any obligation to pay restitution. That argument finds no support in the text of the MVRA. While Section 3664(d)(5) requires the court to act within 90 days, nothing in the statute provides that the court loses the power to act if it misses that deadline, and this Court has held that "[t]here is no presumption or general rule that for every duty imposed upon the court * * * there must exist some corollary punitive sanction for departures or omissions." *United States* v. *Montalvo-Murillo*, 495 U.S. 711, 717 (1990). To the contrary, when "a statute does not specify a consequence for noncompliance with statutory timing provisions, the federal courts will not in the ordinary course impose their own coercive sanction." *United States* v. *James Daniel Good Real Prop.*, 510 U.S. 43, 63-64 (1993). Applying any other interpretive principle would conflict with the basic obligation to order restitution that the statute imposes on a sentencing court.

Petitioner's position also disregards the statutory context and legislative history. The MVRA contains a

variety of procedural guarantees aimed at promoting the interest of victims in obtaining full restitution. Section 3664(d)(5) is one such guarantee, serving to protect victims against undue delay. Nothing in the statute or its history suggests that Congress established those deadlines to protect *defendants* from delay. The district court's failure to comply with a statute intended to protect victims provides no reason to confer a windfall on a defendant at his victim's expense.

Petitioner suggests that Section 3664(d)(5) is a mandatory claim-processing rule, the violation of which precludes judicial action, but that is simply a restatement of his flawed argument that the statute prohibits the district court from ordering restitution after the 90-day deadline. Section 3664(d)(5) is unlike other provisions that this Court has treated as claim-processing rules because it imposes a duty on the court, not on any of the litigants.

Petitioner also argues that allowing district courts to fix the amount of restitution more than 90 days after sentencing will lead to piecemeal appellate litigation and interfere with the orderly administration of justice. Those policy considerations provide no basis for departing from the statutory text and history, and in any event, petitioner's concerns are overstated. Cases in which a defendant separately appeals his sentence and a restitution award will be relatively infrequent, and courts will often be able to consolidate the two appeals. Thus, the interpretation adopted by the court below will not significantly burden courts of appeals.

Finally, because petitioner has made no effort to show that the district court's delay in ordering restitution prejudiced him in any way, this case presents no occasion to consider what remedy might be appropriate

if a defendant could show prejudice. Although the district court erred in delaying the award of restitution, that error caused no harm to the defendant, and therefore provides no basis for setting aside the court's order.

ARGUMENT

A DISTRICT COURT'S FAILURE TO MEET THE 90-DAY DEADLINE OF SECTION 3664(d)(5) DOES NOT EXTINGUISH ITS OBLIGATION TO ORDER RESTITUTION

A. The Text Of The MVRA Mandates That A District Court Award Restitution, And The Court's Mere Failure To Meet A Statutory Deadline Does Not Alter That Obligation

The court of appeals correctly held that a district court should order restitution even when more than 90 days have elapsed after a defendant's sentencing. In arguing to the contrary, petitioner relies on Section 3664(d)(5), which provides that if the victim's losses cannot be ascertained ten days before sentencing, the district court "shall set a date for the final determination of the victim's losses, not to exceed 90 days after sentencing." 18 U.S.C. 3664(d)(5). According to petitioner, if the district court fails to meet that deadline, it no longer has any power to award restitution. That interpretation of Section 3664(d)(5) is contrary to the canon that a statute requiring that an act be performed by a particular deadline does not, without more, eliminate the power to act if the deadline is missed. It is also at odds with Section 3663A(a)(1), which provides that, "[n]otwithstanding any other provision of law, when sentencing a defendant convicted of [a covered offense], the court shall order * * * restitution." 18 U.S.C. 3663A(a)(1). That provision confirms Congress's intent that courts award

restitution even when the 90-day deadline has not been met.

1. Petitioner correctly points out (Br. 12) that the 90-day provision of Section 3664(d)(5) is a "deadline, rather than an aspirational admonition," and that it therefore "cannot be disregarded by a district court." Because Section 3664(d)(5) is mandatory, a district court has a duty to make a final determination of a victim's losses within 90 days after sentencing. It does not follow, however, that the appropriate sanction when a court misses the 90-day deadline is to prohibit it from ordering restitution altogether. Petitioner identifies no provision of the statute that prescribes such a remedy for a violation of Section 3664(d)(5), and there is none.

Petitioner's construction of Section 3664(d)(5) is incompatible with the rule that "if a statute does not specify a consequence for noncompliance with statutory timing provisions, the federal courts will not in the ordinary course impose their own coercive sanction." *United States* v. *James Daniel Good Real Prop.*, 510 U.S. 43, 63-64 (1993). This Court has repeatedly endorsed that principle, declining to "infer congressional intent to limit an agency's power to get a mandatory job done merely from a specification to act by a certain time." *Barnhart* v. *Peabody Coal Co.*, 537 U.S. 149, 160 (2003). As the court of appeals recognized, "Congress imposes deadlines on other branches of government to prod them into ensuring the timely completion of their statutory obligations to the public, not to allow those branches the chance to avoid their obligations just by dragging their feet." Pet. App. 13a.

This Court has explained that "a statute directing official action needs more than a mandatory 'shall' before the grant of power can sensibly be read to expire

when the job is supposed to be done." *Peabody Coal*, 537 U.S. at 161; *Regions Hosp.* v. *Shalala*, 522 U.S. 448, 459 n.3 (1998) ("The Secretary's failure to meet the deadline * * * does not mean that official lacked power to act beyond it."); *Brock* v. *Pierce County*, 476 U.S. 253, 260 (1986) ("We would be most reluctant to conclude that every failure of an agency to observe a procedural requirement voids subsequent agency action, especially when important public rights are at stake."); see 3 Norman J. Singer & J.D. Shambie Singer, *Statutes and Statutory Construction* § 57:19, at 74 (7th ed. 2008) ("The general rule is that if a provision of a statute states a time for performance of an official duty, without any language denying performance after a specified time, it is directory."). That rule rests on "the great principle of public policy, applicable to all governments alike, which forbids that the public interests should be prejudiced by the negligence of the officers or agents to whose care they are confided." *United States* v. *Nashville, Chattanooga & St. Louis Ry.*, 118 U.S. 120, 125 (1886).

The rule applies even when the relevant "agency" is a federal court and the underlying proceeding is a criminal case. In *United States* v. *Montalvo-Murillo*, 495 U.S. 711 (1990), this Court held that a district court's failure to conduct a pretrial detention hearing within the time limits specified by the Bail Reform Act of 1984, 18 U.S.C. 3142(e) and (f), did "not defeat the Government's authority to seek detention." 495 U.S. at 717. While noting that "the time limitations of the Act must be followed with care and precision," the Court observed that the Act was "silent on the issue of a remedy for violations" of those limits. *Id.* at 716. The Court then explained that "[t]here is no presumption or general rule

that for every duty imposed upon the court or the Government and its prosecutors there must exist some corollary punitive sanction for departures or omissions, even if negligent." *Id.* at 717. In the context of the duty to hold a timely bail hearing, the Court held that "the sanction for breach is not loss of all later powers to act." *Id.* at 718. Instead, noting that "[a]utomatic release contravenes the object of the statute," and recognizing that some errors in the application of statutory time limits are "inevitable," the Court saw "no reason to bestow upon the defendant a windfall and to visit upon the Government and the citizens a severe penalty by mandating release of possibly dangerous defendants" whenever such errors occur. *Id.* at 720-721.

The reasoning of *Montalvo-Murillo* is directly on point here. Like the Bail Reform Act, the MVRA requires action within a specified time limit, but it is silent on any penalty for failure to meet that time limit. And like the Bail Reform Act, the MVRA serves important public purposes, which petitioner's reading would frustrate by conferring a windfall on defendants at the expense of victims. As in *Montalvo-Murillo*, the district court's failure to act on time therefore does not mean that it is powerless to act at all.

Petitioner attempts (Br. 27 n.13) to distinguish *Montalvo-Murillo* on the ground that pretrial detention is a "regulatory device," while restitution is "punitive." Even assuming that petitioner is correct, he fails to explain why the distinction should matter. As the Court noted in *Montalvo-Murillo*, bail determinations involve "a vital liberty interest." 495 U.S. at 716. The Court's holding in that case rested not on an assumption that the interests at stake were unimportant but rather on a recognition that a statutory deadline for action does not

imply loss of authority to act when the deadline is missed. Petitioner's further observation (Pet. Br. 27 n.13) that the MVRA involves a "final determination" rather than a "preliminary inquiry" also fails to distinguish *Montalvo-Murillo*. The deprivation that pretrial detention entails is "final" in the sense that liberty once lost cannot later be restored. And many of this Court's prior cases concluding that an agency retains the power to act after a time limit for mandatory action has expired likewise involved final actions. See, *e.g.*, *Peabody Coal*, 537 U.S. at 153; *Brock*, 476 U.S. at 256 & n.3.

2. Reading Section 3664(b)(5) to disable a court from ordering restitution once the 90-day deadline has passed would conflict with the court's fundamental obligation under the statute. Section 3663A states that, "[n]otwithstanding any other provision of law, when sentencing a defendant convicted of [a covered offense], the court shall order * * * restitution." 18 U.S.C. 3663A(a)(1). In light of that provision, the court of appeals correctly held that the 90-day deadline "can be reasonably understood only as a subsidiary command to the Act's primary and overriding directive that restitution *must* be ordered for certain crimes." Pet. App. 10a.

Petitioner suggests (Br. 19 n.8) that giving that directive its ordinary meaning "makes no sense because it renders Section 3663A(d), which requires compliance with Section 3664, meaningless." But Section 3663A(d) merely provides that "[a]n order of restitution under [Section 3663A] shall be issued and enforced in accordance with Section 3664," which specifies the procedures governing the issuance of restitution awards. Those procedural provisions are not rendered "meaningless" simply because a court can award restitution after missing Section 3664(d)(5)'s deadline (or failing to comply

perfectly with any of the other specified rules). See *Montalvo-Murillo*, 495 U.S. at 717-718 ("reject[ing] the contention that if there has been a deviation from the time limits of [a] statute," the resulting proceeding is not one "conducted 'pursuant to'" the procedural provisions of that statute). Instead, the procedural provisions retain meaning because they notify the court, the parties, and the victim of their respective roles in determining restitution.

In particular, the Section 3664(d)(5) deadline has meaning because it imposes a duty on district judges to order restitution within the statutory time limit. Although there may be cases, such as this one, in which court misses the deadline, "district judges can be presumed to insist upon compliance with the law," and therefore it is not appropriate to "invent a remedy to satisfy some perceived need to coerce the courts * * * into complying with the statutory time limits." *Montalvo-Murillo*, 495 U.S. at 721; see *Mickens* v. *Taylor*, 535 U.S. 162, 173 (2002) (rejecting the proposition that "there must be a threat of sanction (to wit, the risk of conferring a windfall upon the defendant) in order to induce 'resolutely obdurate' trial judges to follow the law") (quoting *id.* at 208 (Souter, J., dissenting)); see also *Ohio* v. *Akron Ctr. for Reprod. Health*, 497 U.S. 502, 515 (1990) ("Absent a demonstrated pattern of abuse or defiance, a State may expect that its judges will follow mandated procedural requirements.").

Should a district court refuse for some reason to comply with its obligation to order restitution within the Section 3664(d)(5) time limit, it would be violating a clear duty, and an appellate court could issue a writ of mandamus to compel it to act. See *Cheney* v. *United States Dist. Ct.*, 542 U.S. 367, 380-381 (2004). Indeed, 18

U.S.C. 3771 gives crime victims a specific statutory right to seek a writ of mandamus to correct a violation of their rights to "full and timely restitution" and to "proceedings free from unreasonable delay." 18 U.S.C. 3771(a)(6), (7) and (d)(3). Thus, Section 3664(d)(5) remains meaningful even though its violation does not deprive the district court of the power to order restitution.

B. Petitioner's Interpretation Of Section 3664(d)(5) Disregards The Statutory Context

This Court has emphasized that "the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Davis* v. *Michigan Dep't of the Treasury*, 489 U.S. 803, 809 (1989). Here, an examination of the MVRA as a whole confirms that the district court retains power to order restitution even if it misses the 90-day deadline of Section 3664(d)(5).

1. The MVRA is one of a series of enactments that have dramatically altered the role of restitution in federal criminal cases in the last 30 years, with the system changing from one in which victims were rarely afforded any restitution to one in which full restitution is often mandatory. The victim's role in the sentencing process has likewise been transformed. While previously viewed as mere bystanders, victims are now participants who have identifiable rights that both the government and the courts are bound to protect.

Congress began effecting that transformation in 1982, with the Victim and Witness Protection Act (VWPA), Pub. L. No. 97-291, 96 Stat. 1248. That statute permitted federal courts, when sentencing defendants convicted of certain offenses, to order restitution in addition to any other penalty authorized by law. 18 U.S.C.

3579(a)(1) (1982). Since then, Congress has continued to expand the availability of restitution in the federal system. Most significantly, in 1996, Congress adopted the MVRA, which made restitution mandatory for all victims of specified crimes, without regard to the defendant's ability to pay. 18 U.S.C. 3663A(a)(1), 3664(f)(1)(A). And it reiterated and expanded upon victims' rights in the Crime Victims' Rights Act of 2004, Pub. L. 108-405, Tit. I, § 102(a), 118 Stat. 2261 (18 U.S.C. 3771), which, as noted above, affords victims "[t]he right to full and timely restitution as provided in law," 18 U.S.C. 3771(a)(6), and gives them the ability to enforce those rights through mandamus.

As a result of those enactments, federal law now contains a detailed procedural framework intended to afford most identifiable victims full restitution at sentencing. After a conviction or guilty plea, the government must provide the probation officer with a list of known victims and suggested restitution amounts "not later than 60 days prior to the date initially set for sentencing." 18 U.S.C. 3664(d)(1). The victims may submit additional information about their losses directly to the probation officer. 18 U.S.C. 3664(d)(2)(A)(iii) and (v). Both the probation officer and the government must communicate with the victims about the restitution process, advising them of the time and place of the sentencing hearing and their opportunity to submit loss information. 18 U.S.C. 3664(d)(1) and (2). And the defendant must provide the probation officer with an affidavit "fully describing [his or her] financial resources." 18 U.S.C. 3664(d)(3).

The probation officer must then "conduct an investigation and submit a report that contains sufficient information for the court to order restitution." Fed. R. Crim.

P. 32(c)(1)(B); see 18 U.S.C. 3664(a). Once the probation officer has completed the report, the court "may require additional documentation or hear testimony," 18 U.S.C. 3664(d)(4), or it may refer the matter to a magistrate judge or special master. 18 U.S.C. 3664(d)(6). If that process fails to identify an "ascertainable" victim loss "by the date that is 10 days prior to sentencing," "the attorney for the Government or the probation officer shall so inform the court, and the court shall set a date for the final determination of the victim's losses, not to exceed 90 days after sentencing." 18 U.S.C. 3664(d)(5).

The district court must then order "restitution to each victim in the full amount of each victim's losses," and "without consideration of the economic circumstances of the defendant." 18 U.S.C. 3664(f)(1)(A) and (2). Once entered, a restitution order can be modified in a number of specified ways. See 18 U.S.C. 3664(*o*). Of particular relevance here, a victim has 60 days from the discovery of "further losses" to petition for an amended restitution order, and the victim may obtain such an order "upon a showing of good cause" for failing to include such losses in the initial claim. 18 U.S.C. 3664(d)(5). In addition, the district court may adjust the payment schedule if the defendant's economic circumstances change. 18 U.S.C. 3664(k).

2. Viewed as a whole, the MVRA makes clear that securing an award of full restitution to all identifiable victims is now an integral part of federal sentencing. Thus, restitution must be ordered even when the defendant's financial situation makes the victim's receipt of actual compensation doubtful, 18 U.S.C. 3664(f)(1)(A); when the victim declines to cooperate in obtaining restitution, 18 U.S.C. 3664(g)(1); when the victim chooses not to personally receive any restitution, 18 U.S.C.

3664(g)(2); or when the victim has already been compensated through another source, 18 U.S.C. 3664(f)(1)(B).

Given that statutory background, it would be highly anomalous if Section 3664(d)(5) were construed to mean that a district court's delay in ordering restitution extinguishes the court's power to make that order, with a concomitant denial of a victim's rights. Petitioner's interpretation of Section 3664(d)(5) would have the perverse consequence of allowing a district court's erroneous delay in complying with its obligations to confer a windfall on defendants at the expense of the societal goals furthered by restitution and of the victims the statute was enacted to protect.

3. Petitioner emphasizes (Br. 20-21) that the second sentence of Section 3664(d)(5) permits a victim who discovers additional losses to petition the court for an "amended restitution order" within 60 days. According to petitioner (Br. 21), that provision would be unnecessary if Section 3664(d)(5) did not deprive a court of the power to enter a restitution order more than 90 days after sentencing. That is incorrect. Once the district court enters a restitution order, the order is final, see 18 U.S.C. 3664(*o*), and therefore the second sentence of Section 3664(d)(5) is necessary to give the court continuing authority to amend the order. By contrast, when no order has been issued, no statute divests the district court of its obligation under Section 3663A to impose restitution. Indeed, far from supporting petitioner's claim, the second sentence of Section 3664(d)(5) demonstrates that Congress intended for *all* of the victim's losses to be compensated by the defendant, even when doing so requires an amended restitution order, unless the need for such an amended order was the fault of the victim. Congress's desire that victims receive full com-

pensation is inconsistent with petitioner's claim that a victim should forfeit any claim to restitution if the district court is dilatory.

C. The Legislative History Of The MVRA Confirms That The Lapse Of The Section 3664(d)(5) Deadline Does Not Defeat A Victim's Right To Restitution

Because the statutory language compels the interpretation adopted by the court of appeals, there is no need for this Court to resort to legislative history. See *United States* v. *Ron Pair Enters., Inc.*, 489 U.S. 235, 240-241 (1989). Nonetheless, the legislative history of the MVRA serves to further refute petitioner's interpretation. That history demonstrates what is apparent from Section 3663A: Congress's "intent that courts order full restitution to all identifiable victims of covered offenses." S. Rep. No. 179, 104th Cong., 1st Sess. 18 (1995) (*Senate Report*). The result petitioner seeks here would frustrate that intent.

The Senate Judiciary Committee observed in discussing Section 3664(d)(5) that "the need for finality and certainty in the sentencing process dictates that [the restitution] determination be made quickly, but also recognizes that justice requires that this particular aspect of the criminal sentence be subject to review in the light of changed circumstances." *Senate Report* 20. The Committee went on to emphasize that "restitution must be considered a part of the criminal sentence, and * * * justice cannot be considered served until full restitution is made." *Ibid.* As the First Circuit has observed, the Committee's discussion "did not relate the 90-day requirement to the interests of defendants" in avoiding delay. *United States* v. *Cheal*, 389 F.3d 35, 49 (2004). Indeed, in discussing the Committee's efforts to create

a "streamlined process" for awarding restitution, the report explained that those procedures would be lawful because "[t]he sole due process interest of the defendant being protected during the sentencing phase is the right not to be sentenced on the basis of invalid premises or inaccurate information." *Senate Report* 20.

Thus, the Senate Judiciary Committee report confirms that the MRVA was designed to serve the interests of justice, which Congress equated with the swift award of full compensation to victims. Congress displayed no interest in protecting *defendants* from delays in awarding restitution, let alone any intent to award defendants a windfall at the expense of victims when such delays occur. Accordingly, as several courts of appeals have observed, the history suggests that the MVRA's "intended beneficiaries are the victims, not the victimizers." *Cheal*, 389 F.3d at 49 (quoting *United States* v. *Grimes*, 173 F.3d 634, 639 (7th Cir. 1999)); see *United States* v. *Zakhary*, 357 F.3d 186, 191 (2d Cir.) ("[T]he purpose behind the statutory ninety-day limit on the determination of victims' losses is not to protect defendants from drawn-out sentencing proceedings or to establish finality; rather, it is to protect crime victims from the willful dissipation of defendants' assets."), cert. denied, 541 U.S. 1092 (2004).[2]

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[2] Petitioner relies (Br. 39-41) on the rule of lenity, but that rule has no application here. The rule of lenity provides that "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity," thereby ensuring that individuals have "'fair warning concerning conduct rendered illegal.'" *Liparota* v. *United States*, 471 U.S. 419, 427 (1985) (quoting *Rewis* v. *United States*, 401 U.S. 808, 812 (1971)). Section 3664(d)(5), however, is a procedural regulation, not a criminal statute, and it does not render any conduct illegal or set the substantive boundaries of punishment. It therefore is not subject to the rule of lenity. In any event, even where the rule of lenity is otherwise relevant,

D. Petitioner's Reliance On Cases Involving "Claims-Processing" Rules Is Misplaced

In the court of appeals, petitioner argued that the district court lost jurisdiction to enter a restitution order once 90 days had elapsed after sentencing. Pet. App. 9a. The court of appeals correctly rejected that argument, determining "that the 90-day deadline set by [Section] 3664(d)(5) is [not] jurisdictional." *Ibid.* As this Court has explained, "jurisdiction" refers only to "the courts' statutory or constitutional *power* to adjudicate [a] case." *United States* v. *Cotton*, 535 U.S. 625, 630 (2002) (quoting *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 89 (1998)); *Kontrick* v. *Ryan*, 540 U.S. 443 (2004); cf. *Bowles* v. *Russell*, 551 U.S. 205, 210 (2007) (discussing this Court's "longstanding treatment of statutory time limits *for taking an appeal* as jurisdictional") (emphasis added).

Petitioner now recognizes that Section 3664(d)(5) is not jurisdictional, arguing instead (Br. 28) that it is "a mandatory claims-processing rule." That is simply another way of restating petitioner's conclusion that Section 3664(d)(5) prohibits a district court from entering a restitution order more than 90 days after sentencing. For the reasons explained above, petitioner's interpretation of Section 3664(d)(5) is contrary to its text, statutory context, and legislative history.

In attempting to portray Section 3664(d)(5) as a "claims-processing statute," petitioner argues (Br. 24-

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it is reserved for cases involving a "grievous ambiguity" in the statutory text such that, "after seizing everything from which aid can be derived, * * * [the Court] can make no more than a guess as to what Congress intended." *Muscarello* v. *United States*, 524 U.S. 125, 138-139 (1998) (internal quotation marks and citations omitted). Because the statutory language is clear, there is no need to resort to the rule of lenity here.

25) that it places upon the government, as "the party that seeks a restitution order," the responsibility of obtaining that order within the statutory time limits. That reasoning rests on a misunderstanding of the system Congress created for awarding restitution to victims of federal crimes. Restitution is not an alternative penalty that the government has the option of requesting at sentencing. It is a right of the victim, which the court must award unless extraordinary circumstances make doing so impracticable. 18 U.S.C. 3771(a)(6); see 18 U.S.C. 3663A(c)(3). Nor is the government solely responsible for ensuring an award of restitution: district courts share an important part of that responsibility. For example, both the government and the district court (through its probation officer) must communicate with the victims and collect information sufficient to order restitution. 18 U.S.C. 3664(a), (d)(1) and (2)(A). And the court is not limited to the information the government provides but "may require additional documentation or hear testimony." 18 U.S.C. 3664(d)(4). In addition, victims themselves may participate directly in sentencing proceedings by submitting information to the probation officer on the extent of their losses, 18 U.S.C. 3664(d)(2)(A)(iii) and (vi), by being heard at sentencing, 18 U.S.C. 3771; Fed. R. Crim. P. 32(c)(1)(B) and 60(a)(3), and by petitioning the court directly should an amended restitution order be appropriate because of additional losses or a change in the defendant's economic circumstances, 18 U.S.C. 3664(d)(5) and (k).

Accordingly, petitioner errs in arguing that restitution is merely a "claim" that the government "processes" at sentencing. The government must seek restitution on the victim's behalf, and the court (except in rare circumstances not applicable here) must award it. If the gov-

ernment fails to provide the probation officer with a listing of the amounts subject to restitution, it does not relieve the probation officer of the independent responsibility to "submit a report that contains sufficient information for the court to order restitution." Fed. R. Crim. P. 32(c)(1)(B); see 18 U.S.C. 3664(a). Nor does it allow the court to neglect its own responsibility to award such relief to victims. 18 U.S.C. 3663A(a)(1); see, *e.g.*, *Grimes*, 173 F.3d at 640.

Significantly, Section 3664(d)(5) does not specify that the government must obtain any order of restitution within 90 days of sentencing. Instead, it requires "the *court* [to] set a date for the final determination of the victim's losses" within that time frame. (emphasis added). Alhough it is no doubt good practice for all parties, including the government, to remind the court of its duty to act within the 90-day period, nothing in Section 3664(d)(5) requires the government to file a motion requesting compliance with the time limit.[3]

That feature of Section 3664(d)(5) serves to distinguish the cases on which petitioner chiefly relies (Br. 23-

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[3] In any event, if Section 3664(d)(5)'s time limit were truly a "rigid" limitation on the court's authority in the sense that petitioner contemplates (Br. 24), the government's filing of such a motion would not suffice to preserve the victim's right to restitution; the court would actually have to make a timely award. Accordingly, petitioner's concession (Br. 35 n.16) that the timely filing of a motion to comply with the deadline would, through tolling principles, permit the entry of a restitution order more than 90 days after sentencing fatally undermines the logic of his argument (Br. 27) that Section 3664(d)(5) is a "mandatory claims-processing rule." True claims-processing rules are "inflexible" and "unalterable" when a party objects, as petitioner recognizes. Br. 24. Petitioner's acknowledgment that tolling must apply here concedes that Congress cannot have intended the passing of the 90-day deadline to defeat its paramount objective of awarding restitution.

24), each of which involved a rule setting a deadline by which a *litigant* must file a particular pleading or claim. See *Carlisle* v. *United States*, 517 U.S. 416 (1996) (motion for a judgment of acquittal under Federal Rule of Criminal Procedure 29(c)(1)); *Eberhart* v. *United States*, 546 U.S. 12 (2005) (per curiam) (motion for a new trial under Federal Rule of Crimi al Procedure 33); *Kontrick* v. *Ryan*, 540 U.S. 443 (2004) (objection to a debtor's discharge under Federal Rule of Bankruptcy Procedure 4004(a)). No such rule is involved here. Neither the government nor the victim defaulted on any statutory requirement that Congress set as a precondition to restitution. Instead, the district court failed to perform its "mandatory obligation * * * on behalf of the public" to enter a restitution order within 90 days of sentencing. Pet. App. 15a. That error did not deprive the district court of its authority to act but merely delayed the victim's receipt of the award of restitution to which he was entitled.

E. Reading Section 3664(d)(5) To Penalize Victims For A Delay In Ordering Restitution Is Not Necessary To Protect The Orderly Administration Of Justice

Petitioner asserts (Br. 28) that the court of appeals' interpretation of the MVRA "undermine[s] the orderly administration of criminal justice" by preventing the sentencing process from achieving finality, promoting piecemeal appeals, and interfering with the administration of corrections. Petitioner's arguments amount to a claim that reading the statute as written would yield bad policy, but that is no basis for disregarding the plain statutory text. See *Connecticut Nat'l Bank* v. *Germain*, 503 U.S. 249, 253-254 (1992). In any event, petitioner's policy concerns are unfounded.

Petitioner contends (Br. 28-31) that the 90-day time limit in Section 3664(d)(5) must be interpreted to ensure that a final appealable judgment is issued within a reasonable time after sentencing. The premise of his argument is that a defendant cannot appeal the judgment in a criminal case until the district court has made a final determination about restitution. That is incorrect. Instead, as soon as a district court imposes sentence and issues a judgment reflecting that sentence, the judgment is appealable. See Fed. R. App. P. 4(b); *Berman* v. *United States*, 302 U.S. 211, 212 (1937) ("Final judgment in a criminal case means sentence."). That is true even where, as here, the sentence leaves the determination of restitution open. See *Cheal*, 389 F.3d at 51 (holding that a sentence that "impose[s] a restitution obligation" is a final, appealable judgment even if it does not specify the amount of restitution). It simply is not the case, as petitioner appears to assume, that a sentence—hence, a final judgment—must await fixing the amount of restitution. Indeed, Section 3664(d)(5) directly refutes this theory by providing that the "final determination of the victim's losses" may sometimes take place "after sentencing."

Contrary to petitioner's suggestion (Br. 31-32), the filing of a notice of appeal does not divest the district court of jurisdiction to fix the amount of restitution. Instead, under *Griggs* v. *Provident Consumer Discovery Co.*, 459 U.S. 56 (1982), the notice of appeal "divests the district court of its control over those aspects of the case involved in the appeal." *Id.* at 58. If the judgment under appeal does not finally resolve the amount of restitution, the district court retains jurisdiction to determine that amount. In that respect, the determination of the amount of restitution is analogous to the determination

of the amount of attorney's fees to be awarded to a prevailing party. This Court has held that a judgment may be final even if the district court has not yet made a determination of fees, *Budinich* v. *Becton Dickinson & Co.*, 486 U.S. 196 (1988), and the district court retains jurisdiction over that question even if the losing party has filed a notice of appeal.

Petitioner points out (Br. 31) that there is a potential for multiple appeals when the amount of restitution is determined after sentencing. That may be true, but the burden imposed by such appeals is likely to be minimal. The victim's losses will frequently be ascertainable before sentencing, and the court need not invoke Section 3664(d)(5) at all. And in the majority of cases in which the court does invoke that provision, it can be expected to comply with the law and issue an amended judgment setting forth a "final determination of the victim's losses" within 90 days of sentencing. Federal appellate courts currently take more than a year, on average, to resolve a criminal appeal. See Administrative Office of the U.S. Courts, *Judicial Business of the United States Courts: 2008 Annual Report of the Director* 107 (2009). Thus, should the defendant wish to appeal both the original judgment and the determination of the amount of restitution, the court of appeals will likely be able to consolidate the cases.

In any event, the MVRA places the goal of awarding restitution to victims above any policy of avoiding piecemeal criminal appeals. After all, even under petitioner's interpretation, the statute contains the potential for piecemeal appellate litigation because the second sentence of Section 3664(d)(5) permits victims to reopen restitution awards when they discover further losses. Accordingly, the interest in avoiding an occasional piece-

meal appeal cannot justify interpreting the statute to deprive blameless victims of their right to compensation simply because of timing errors by district courts.

Petitioner also complains (Br. 32-33) that the interpretation adopted by the court of appeals "produces problems for the administration of corrections" because it may require that a defendant be returned to court after he has already been committed to the custody of the Bureau of Prisons. But petitioner does not dispute that Section 3664(d)(5) allows a district court to make a final determination regarding restitution after sentencing. Assuming that the defendant must be returned to court for that final determination to occur, the Bureau of Prisons will incur the same burden regardless whether the 90-day period has expired. Thus, petitioner's argument reduces to a claim that restitution should be finally imposed at sentencing, or not at all. Whatever the merits of that view as a policy matter, Congress has adopted a different approach.

F. Because The Delay In Awarding Restitution Did Not Harm Petitioner, This Case Does Not Present The Question Whether Any Remedy Exists For Prejudicial Delay

1. Nearly all of the courts of appeals to consider the question have agreed with the court below that district courts retain the authority to order restitution after the 90-day period of Section 3664(d)(5) has expired, at least in the absence of any prejudice to the defendant. *United States* v. *Bogart*, 576 F.3d 565, 573 (6th Cir. 2009) ("[T]he district court's error in failing to comply with [Section] 3664(d)(5) was harmless."); *United States* v. *Balentine*, 569 F.3d 801, 807 (8th Cir. 2009) (affirming order where defendant did "not contend that entry of the untimely restitution order impeded her ability to

dispute the amount of restitution"), petition for cert. pending, No. 09-6760 (filed Sept. 28, 2009); *United States* v. *Marks*, 530 F.3d 799, 812 (9th Cir. 2008) ("[B]ecause the procedural requirements of section 3664 were designed to protect victims, not defendants, the failure to comply with them is harmless error absent actual prejudice to the defendant.") (citations omitted); *United States* v. *Johnson*, 400 F.3d 187, 199 (4th Cir.) ("[T]he failure to conform with the ninety-day limit constitutes harmless error absent prejudice."), cert. denied, 546 U.S. 856 (2005); *Zakhary*, 357 F.3d at 191 ("[A] district court's failure to determine identifiable victims' losses within ninety days after sentencing, as prescribed by [Section] 3664(d)(5), will be deemed harmless error to the defendant unless he can show actual prejudice from the omission."); cf. *Cheal*, 389 F.3d at 48-49 & n.15 (reviewing for plain error a violation of the 90-day limit to which the defendant did not object in the district court); but see *United States* v. *Maung*, 267 F.3d 1113 (11th Cir. 2001).

Some courts of appeals have suggested that a remedy may be available when a delay in ordering restitution actually prejudices a defendant by, for example, depriving him of evidence that he might have used to defeat a restitution claim. See, *e.g.*, *United States* v. *Moreland*, 509 F.3d 1201, 1224-1225 (9th Cir. 2007), vacated on other grounds, 129 S. Ct. 997 (2009); *Johnson*, 400 F.3d at 199. As the court below correctly concluded, this case presents no occasion to consider what remedy would be appropriate in such a case, because petitioner "does not purport to identify any way in which his substantial rights were infringed by the district court's decision requiring him to pay restitution later rather than sooner." Pet. App. 21a.

Under Rule 52(a) of the Federal Rules of Criminal Procedure, "[a]ny error, defect, irregularity, or variance that does not affect substantial rights must be disregarded." Presumptively, Rule 52(a) applies to "*all* errors where a proper objection is made." *Neder* v. *United States*, 527 U.S. 1, 7 (1999). As this Court observed in *Montalvo-Murillo*, Rule 52's "principle of harmless-error analysis * * * is the governing precept in most matters of criminal procedure." 495 U.S. at 722. Thus, the Court in that case rejected the suggestion that a delay in holding a bail hearing should cause the release of a defendant otherwise subject to pretrial detention, noting that such release "has neither causal nor proportional relation to any harm caused by the delay in holding the hearing." *Id.* at 721. Because "the noncompliance with the timing requirement had no substantial influence on the outcome of the [bail] proceeding," the Court held that "the detention was harmless." *Id.* at 722. That reasoning is fully applicable here.

Petitioner attempts (Br. 45 n.18) to distinguish *Montalvo-Murillo*, but his claim here parallels the argument advanced and rejected in that case. Like Montalvo-Murillo, petitioner contends that a delay in holding a hearing deprived the court of its authority to act. Moreover, the result petitioner seeks—complete denial of restitution—is every bit as much of a "windfall" as the pretrial release Montalvo-Murillo requested. 495 U.S. at 720. Finally, petitioner is no more able than Montalvo-Murillo to show any harm from the delay. Indeed, petitioner acknowledged that he knew about "the total [amount of restitution] within the 90-day period," and he could not articulate any prejudice from the delay in awarding that amount. J.A. 64. Accordingly, "it is clear that the noncompliance with the timing require-

ment had no substantial influence on the outcome of the [restitution] proceeding," making the delay in awarding restitution "harmless." *Montalvo-Murillo*, 495 U.S. at 722.

2. In arguing that the delay in this case was not harmless, petitioner asserts (Br. 43) that the restitution award was "illegal" because the district court "lacked statutory authorization" to enter it. In petitioner's view (Br. 42), "[b]ecause an illegal sentence always affects substantial rights, its imposition cannot be harmless." See Br. 44 ("[A]n illegal sentence cannot be treated as harmless."). To the extent petitioner's argument assumes that sentencing errors are always prejudicial, it rests on a flawed premise, given that this Court has repeatedly applied harmless-error analysis to errors involving sentencing. See, *e.g.*, *Washington* v. *Recuenco*, 548 U.S. 212, 218-222 (2006); *Jones* v. *United States*, 527 U.S. 373, 401 (1999); *Williams* v. *United States*, 503 U.S. 193, 201-203 (1992). More importantly, petitioner fails to identify any statutory provision that prohibited the district court from awarding restitution in this case. To the contrary, as explained above, Section 3663A mandated an award of restitution. Thus, the award does not constitute an "illegal sentence."[4]

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[4] Courts have used the phrase "illegal sentence" to refer to a sentence that is substantively unauthorized by statute because, for example, it exceeds the maximum term authorized. See, *e.g.*, *United States* v. *Barwig*, 568 F.3d 852, 858 (10th Cir. 2009); *United States* v. *Vera*, 542 F.3d 457, 459 (5th Cir. 2008). A court may not order this kind of sentence regardless of the procedures it employs. But when a court enters a lawful sentence through procedurally flawed means, it is fully amenable to harmless-error analysis, as *Recuenco*, *Jones*, and *Williams* confirm.

Section 3664(d)(5) did require the district court to "set a date for the final determination of the victim's losses" within 90 days of sentencing. Thus, error undeniably occurred in this case. But the error was simply the failure to hold the final hearing on restitution within the statutory time limit. Accordingly, the only prejudice that matters is harm resulting from the *timing* of the restitution award. No such harm is even alleged. See NACDL Amicus Br. 4-11 (suggesting various ways in which delay might prejudice a hypothetical defendant, but without arguing that any such prejudice occurred in this case).

3. Nor is there any merit to petitioner's argument (Br. 46-48) that prejudice must be presumed in his case because certain other rules regulating timing in court proceedings are not subject to harmless-error analysis. Section 3664(d)(5) is not a "statute of limitations," because it does not bar the assertion of claims after a specified period. See *Black's Law Dictionary* 1546 (9th ed. 2009). Nor is it intended "primarily to protect defendants against stale or unduly delayed claims." *John R. Sand & Gravel Co.* v. *United States*, 552 U.S. 130, 133 (2008). For similar reasons, Section 3664(d)(5) is not comparable to Federal Rule of Criminal Procedure 29(c), which sets time limits for bringing a motion for a judgment of acquittal. That rule imposes a deadline on a party to the proceeding, not on the court. See p. 24, *supra*. Petitioner's analogies therefore suffer from the same flaw as his effort to show that Section 3664(d)(5) is a "claims-processing" rule.

Finally, the Speedy Trial Act, 18 U.S.C. 3161 *et seq.*, does not assist petitioner, but in fact serves to illustrate why his claim fails. That statute requires a criminal defendant's trial to begin within 70 days of his indictment

or initial appearance. 18 U.S.C. 3161(c)(1). As petitioner points out (Br. 46-47), a failure to observe that time limit may result in a dismissal of the indictment. 18 U.S.C. 3162(a)(2). But courts have not inferred the remedy of dismissal based solely upon the statutory time requirements, as petitioner asks this Court to do. To the contrary, Congress specified that remedy. See *ibid.* ("If a defendant is not brought to trial within the time limit required by section 3161(c) as extended by section 3161(h), the information or indictment shall be dismissed on motion of the defendant."). The Speedy Trial Act illustrates that when Congress intends to confer a benefit on a criminal defendant based upon a district court's failure to act within a specified time, it says so clearly. The failure to include any comparable provision in the MVRA confirms that Congress did not intend for restitution to be denied merely because the order imposing it was delayed.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX

1. 18 U.S.C. 3663A provides:

Mandatory restitution to victims of certain crimes

(a)(1) Notwithstanding any other provision of law, when sentencing a defendant convicted of an offense described in subsection (c), the court shall order, in addition to, or in the case of a misdemeanor, in addition to or in lieu of, any other penalty authorized by law, that the defendant make restitution to the victim of the offense or, if the victim is deceased, to the victim's estate.

(2) For the purposes of this section, the term "victim" means a person directly and proximately harmed as a result of the commission of an offense for which restitution may be ordered including, in the case of an offense that involves as an element a scheme, conspiracy, or pattern of criminal activity, any person directly harmed by the defendant's criminal conduct in the course of the scheme, conspiracy, or pattern. In the case of a victim who is under 18 years of age, incompetent, incapacitated, or deceased, the legal guardian of the victim or representative of the victim's estate, another family member, or any other person appointed as suitable by the court, may assume the victim's rights under this section, but in no event shall the defendant be named as such representative or guardian.

(3) The court shall also order, if agreed to by the parties in a plea agreement, restitution to persons other than the victim of the offense.

(b) The order of restitution shall require that such defendant—

(1) in the case of an offense resulting in damage to or loss or destruction of property of a victim of the offense—

(A) return the property to the owner of the property or someone designated by the owner; or

(B) if return of the property under subparagraph (A) is impossible, impracticable, or inadequate, pay an amount equal to—

(i) the greater of—

(I) the value of the property on the date of the damage, loss, or destruction; or

(II) the value of the property on the date of sentencing, less

(ii) the value (as of the date the property is returned) of any part of the property that is returned;

(2) in the case of an offense resulting in bodily injury to a victim—

(A) pay an amount equal to the cost of necessary medical and related professional services and devices relating to physical, psychiatric, and psychological care, including nonmedical care and treatment rendered in accordance with a method of healing recognized by the law of the place of treatment;

(B) pay an amount equal to the cost of necessary physical and occupational therapy and rehabilitation; and

(C) reimburse the victim for income lost by such victim as a result of such offense;

(3) in the case of an offense resulting in bodily injury that results in the death of the victim, pay an amount equal to the cost of necessary funeral and related services; and

(4) in any case, reimburse the victim for lost income and necessary child care, transportation, and other expenses incurred during participation in the investigation or prosecution of the offense or attendance at proceedings related to the offense.

(c)(1) This section shall apply in all sentencing proceedings for convictions of, or plea agreements relating to charges for, any offense—

(A) that is—

(i) a crime of violence, as defined in section 16;

(ii) an offense against property under this title, or under section 416(a) of the Controlled Substances Act (21 U.S.C. 856(a)), including any offense committed by fraud or deceit; or

(iii) an offense described in section 1365 (relating to tampering with consumer products); and

(B) in which an identifiable victim or victims has suffered a physical injury or pecuniary loss.

(2) In the case of a plea agreement that does not result in a conviction for an offense described in paragraph (1), this section shall apply only if the plea specifically states that an offense listed under such paragraph gave rise to the plea agreement.

(3) This section shall not apply in the case of an offense described in paragraph (1)(A)(ii) if the court finds, from facts on the record, that—

(A) the number of identifiable victims is so large as to make restitution impracticable; or

(B) determining complex issues of fact related to the cause or amount of the victim's losses would complicate or prolong the sentencing process to a degree that the need to provide restitution to any victim is outweighed by the burden on the sentencing process.

(d) An order of restitution under this section shall be issued and enforced in accordance with section 3664.

2. 18 U.S.C. 3664 provides:

Procedure for issuance and enforcement of order of restitution

(a) For orders of restitution under this title, the court shall order the probation officer to obtain and include in its presentence report, or in a separate report, as the court may direct, information sufficient for the court to exercise its discretion in fashioning a restitution order. The report shall include, to the extent practicable, a complete accounting of the losses to each victim, any restitution owed pursuant to a plea agreement, and information relating to the economic circumstances of each defendant. If the number or identity of victims cannot be reasonably ascertained, or other circumstances exist that make this requirement clearly impracticable, the probation officer shall so inform the court.

(b) The court shall disclose to both the defendant and the attorney for the Government all portions of the presentence or other report pertaining to the matters described in subsection (a) of this section.

(c) The provisions of this chapter, chapter 227, and Rule 32(c) of the Federal Rules of Criminal Procedure shall be the only rules applicable to proceedings under this section.

(d)(1) Upon the request of the probation officer, but not later than 60 days prior to the date initially set for sentencing, the attorney for the Government, after consulting, to the extent practicable, with all identified victims, shall promptly provide the probation officer with a listing of the amounts subject to restitution.

(2) The probation officer shall, prior to submitting the presentence report under subsection (a), to the extent practicable—

(A) provide notice to all identified victims of—

(i) the offense or offenses of which the defendant was convicted;

(ii) the amounts subject to restitution submitted to the probation officer;

(iii) the opportunity of the victim to submit information to the probation officer concerning the amount of the victim's losses;

(iv) the scheduled date, time, and place of the sentencing hearing;

(v) the availability of a lien in favor of the victim pursuant to subsection (m)(1)(B); and

(vi) the opportunity of the victim to file with the probation officer a separate affidavit relating to the amount of the victim's losses subject to restitution; and

(B) provide the victim with an affidavit form to submit pursuant to subparagraph (A)(vi).

(3) Each defendant shall prepare and file with the probation officer an affidavit fully describing the financial resources of the defendant, including a complete listing of all assets owned or controlled by the defendant as of the date on which the defendant was arrested, the financial needs and earning ability of the defendant and the defendant's dependents, and such other information that the court requires relating to such other factors as the court deems appropriate.

(4) After reviewing the report of the probation officer, the court may require additional documentation or hear testimony. The privacy of any records filed, or testimony heard, pursuant to this section shall be maintained to the greatest extent possible, and such records may be filed or testimony heard in camera.

(5) If the victim's losses are not ascertainable by the date that is 10 days prior to sentencing, the attorney for the Government or the probation officer shall so inform the court, and the court shall set a date for the final determination of the victim's losses, not to exceed 90 days after sentencing. If the victim subsequently discovers further losses, the victim shall have 60 days after discovery of those losses in which to petition the court for an amended restitution order. Such order may be granted only upon a showing of good cause for the failure to in-

clude such losses in the initial claim for restitutionary relief.

(6) The court may refer any issue arising in connection with a proposed order of restitution to a magistrate judge or special master for proposed findings of fact and recommendations as to disposition, subject to a de novo determination of the issue by the court.

(e) Any dispute as to the proper amount or type of restitution shall be resolved by the court by the preponderance of the evidence. The burden of demonstrating the amount of the loss sustained by a victim as a result of the offense shall be on the attorney for the Government. The burden of demonstrating the financial resources of the defendant and the financial needs of the defendant's dependents, shall be on the defendant. The burden of demonstrating such other matters as the court deems appropriate shall be upon the party designated by the court as justice requires.

(f)(1)(A) In each order of restitution, the court shall order restitution to each victim in the full amount of each victim's losses as determined by the court and without consideration of the economic circumstances of the defendant.

(B) In no case shall the fact that a victim has received or is entitled to receive compensation with respect to a loss from insurance or any other source be considered in determining the amount of restitution.

(2) Upon determination of the amount of restitution owed to each victim, the court shall, pursuant to section 3572, specify in the restitution order the manner in which, and the schedule according to which, the restitution is to be paid, in consideration of—

(A) the financial resources and other assets of the defendant, including whether any of these assets are jointly controlled;

(B) projected earnings and other income of the defendant; and

(C) any financial obligations of the defendant; including obligations to dependents.

(3)(A) A restitution order may direct the defendant to make a single, lump-sum payment, partial payments at specified intervals, in-kind payments, or a combination of payments at specified intervals and in-kind payments.

(B) A restitution order may direct the defendant to make nominal periodic payments if the court finds from facts on the record that the economic circumstances of the defendant do not allow the payment of any amount of a restitution order, and do not allow for the payment of the full amount of a restitution order in the foreseeable future under any reasonable schedule of payments.

(4) An in-kind payment described in paragraph (3) may be in the form of—

(A) return of property;

(B) replacement of property; or

(C) if the victim agrees, services rendered to the victim or a person or organization other than the victim.

(g)(1) No victim shall be required to participate in any phase of a restitution order.

(2) A victim may at any time assign the victim's interest in restitution payments to the Crime Victims

Fund in the Treasury without in any way impairing the obligation of the defendant to make such payments.

(h) If the court finds that more than 1 defendant has contributed to the loss of a victim, the court may make each defendant liable for payment of the full amount of restitution or may apportion liability among the defendants to reflect the level of contribution to the victim's loss and economic circumstances of each defendant.

(i) If the court finds that more than 1 victim has sustained a loss requiring restitution by a defendant, the court may provide for a different payment schedule for each victim based on the type and amount of each victim's loss and accounting for the economic circumstances of each victim. In any case in which the United States is a victim, the court shall ensure that all other victims receive full restitution before the United States receives any restitution.

(j)(1) If a victim has received compensation from insurance or any other source with respect to a loss, the court shall order that restitution be paid to the person who provided or is obligated to provide the compensation, but the restitution order shall provide that all restitution of victims required by the order be paid to the victims before any restitution is paid to such a provider of compensation.

(2) Any amount paid to a victim under an order of restitution shall be reduced by any amount later recovered as compensatory damages for the same loss by the victim in—

(A) any Federal civil proceeding; and

(B) any State civil proceeding, to the extent provided by the law of the State.

(k) A restitution order shall provide that the defendant shall notify the court and the Attorney General of any material change in the defendant's economic circumstances that might affect the defendant's ability to pay restitution. The court may also accept notification of a material change in the defendant's economic circumstances from the United States or from the victim. The Attorney General shall certify to the court that the victim or victims owed restitution by the defendant have been notified of the change in circumstances. Upon receipt of the notification, the court may, on its own motion, or the motion of any party, including the victim, adjust the payment schedule, or require immediate payment in full, as the interests of justice require.

(*l*) A conviction of a defendant for an offense involving the act giving rise to an order of restitution shall estop the defendant from denying the essential allegations of that offense in any subsequent Federal civil proceeding or State civil proceeding, to the extent consistent with State law, brought by the victim.

(m)(1)(A)(i) An order of restitution may be enforced by the United States in the manner provided for in subchapter C of chapter 227 and subchapter B of chapter 229 of this title; or

(ii) by all other available and reasonable means.

(B) At the request of a victim named in a restitution order, the clerk of the court shall issue an abstract of judgment certifying that a judgment has been entered in favor of such victim in the amount specified in the restitution order. Upon registering, recording, docketing, or indexing such abstract in accordance with the rules and requirements relating to judgments of the court of the State where the district court is located, the

abstract of judgment shall be a lien on the property of the defendant located in such State in the same manner and to the same extent and under the same conditions as a judgment of a court of general jurisdiction in that State.

(2) An order of in-kind restitution in the form of services shall be enforced by the probation officer.

(n) If a person obligated to provide restitution, or pay a fine, receives substantial resources from any source, including inheritance, settlement, or other judgment, during a period of incarceration, such person shall be required to apply the value of such resources to any restitution or fine still owed.

(o) A sentence that imposes an order of restitution is a final judgment notwithstanding the fact that—

(1) such a sentence can subsequently be—

(A) corrected under Rule 35 of the Federal Rules of Criminal Procedure and section 3742 of chapter 235 of this title;

(B) appealed and modified under section 3742;

(C) amended under subsection (d)(5); or

(D) adjusted under section 3664(k), 3572, or 3613A; or

(2) the defendant may be resentenced under section 3565 or 3614.

(p) Nothing in this section or sections 2248, 2259, 2264, 2327, 3663, and 3663A and arising out of the application of such sections, shall be construed to create a cause of action not otherwise authorized in favor of any

person against the United States or any officer or employee of the United States.

3. 18 U.S.C. 3771 provides:

Crime victims' rights

(a) RIGHTS OF CRIME VICTIMS.—A crime victim has the following rights:

(1) The right to be reasonably protected from the accused.

(2) The right to reasonable, accurate, and timely notice of any public court proceeding, or any parole proceeding, involving the crime or of any release or escape of the accused.

(3) The right not to be excluded from any such public court proceeding, unless the court, after receiving clear and convincing evidence, determines that testimony by the victim would be materially altered if the victim heard other testimony at that proceeding.

(4) The right to be reasonably heard at any public proceeding in the district court involving release, plea, sentencing, or any parole proceeding.

(5) The reasonable right to confer with the attorney for the Government in the case.

(6) The right to full and timely restitution as provided in law.

(7) The right to proceedings free from unreasonable delay.

(8) The right to be treated with fairness and with respect for the victim's dignity and privacy.

(b) RIGHTS AFFORDED.—

(1) IN GENERAL.—In any court proceeding involving an offense against a crime victim, the court shall ensure that the crime victim is afforded the rights described in subsection (a). Before making a determination described in subsection (a)(3), the court shall make every effort to permit the fullest attendance possible by the victim and shall consider reasonable alternatives to the exclusion of the victim from the criminal proceeding. The reasons for any decision denying relief under this chapter shall be clearly stated on the record.

(2) HABEAS CORPUS PROCEEDINGS.—

(A) IN GENERAL.—In a Federal habeas corpus proceeding arising out of a State conviction, the court shall ensure that a crime victim is afforded the rights described in paragraphs (3), (4), (7), and (8) of subsection (a).

(B) ENFORCEMENT.—

(i) IN GENERAL.—These rights may be enforced by the crime victim or the crime victim's lawful representative in the manner described in paragraphs (1) and (3) of subsection (d).

(ii) MULTIPLE VICTIMS.—In a case involving multiple victims, subsection (d)(2) shall also apply.

(C) LIMITATION.—This paragraph relates to the duties of a court in relation to the rights of a

crime victim in Federal habeas corpus proceedings arising out of a State conviction, and does not give rise to any obligation or requirement applicable to personnel of any agency of the Executive Branch of the Federal Government.

(D) DEFINITION.—For purposes of this paragraph, the term "crime victim" means the person against whom the State offense is committed or, if that person is killed or incapacitated, that person's family member or other lawful representative.

(c) BEST EFFORTS TO ACCORD RIGHTS.—

(1) GOVERNMENT.—Officers and employees of the Department of Justice and other departments and agencies of the United States engaged in the detection, investigation, or prosecution of crime shall make their best efforts to see that crime victims are notified of, and accorded, the rights described in subsection (a).

(2) ADVICE OF ATTORNEY.—The prosecutor shall advise the crime victim that the crime victim can seek the advice of an attorney with respect to the rights described in subsection (a).

(3) NOTICE.—Notice of release otherwise required pursuant to this chapter shall not be given if such notice may endanger the safety of any person.

(d) ENFORCEMENT AND LIMITATIONS.—

(1) RIGHTS.—The crime victim or the crime victim's lawful representative, and the attorney for the Government may assert the rights described in sub-

section (a). A person accused of the crime may not obtain any form of relief under this chapter.

(2) MULTIPLE CRIME VICTIMS.—In a case where the court finds that the number of crime victims makes it impracticable to accord all of the crime victims the rights described in subsection (a), the court shall fashion a reasonable procedure to give effect to this chapter that does not unduly complicate or prolong the proceedings.

(3) MOTION FOR RELIEF AND WRIT OF MANDAMUS.—The rights described in subsection (a) shall be asserted in the district court in which a defendant is being prosecuted for the crime or, if no prosecution is underway, in the district court in the district in which the crime occurred. The district court shall take up and decide any motion asserting a victim's right forthwith. If the district court denies the relief sought, the movant may petition the court of appeals for a writ of mandamus. The court of appeals may issue the writ on the order of a single judge pursuant to circuit rule or the Federal Rules of Appellate Procedure. The court of appeals shall take up and decide such application forthwith within 72 hours after the petition has been filed. In no event shall proceedings be stayed or subject to a continuance of more than five days for purposes of enforcing this chapter. If the court of appeals denies the relief sought, the reasons for the denial shall be clearly stated on the record in a written opinion.

(4) ERROR.—In any appeal in a criminal case, the Government may assert as error the district court's

denial of any crime victim's right in the proceeding to which the appeal relates.

(5) LIMITATION ON RELIEF.—In no case shall a failure to afford a right under this chapter provide grounds for a new trial. A victim may make a motion to re-open a plea or sentence only if—

(A) the victim has asserted the right to be heard before or during the proceeding at issue and such right was denied;

(B) the victim petitions the court of appeals for a writ of mandamus within 10 days; and

(C) in the case of a plea, the accused has not pled to the highest offense charged.

This paragraph does not affect the victim's right to restitution as provided in title 18, United States Code.

(6) NO CAUSE OF ACTION.—Nothing in this chapter shall be construed to authorize a cause of action for damages or to create, to enlarge, or to imply any duty or obligation to any victim or other person for the breach of which the United States or any of its officers or employees could be held liable in damages. Nothing in this chapter shall be construed to impair the prosecutorial discretion of the Attorney General or any officer under his direction.

(e) DEFINITIONS.—For the purposes of this chapter, the term "crime victim" means a person directly and proximately harmed as a result of the commission of a Federal offense or an offense in the District of Columbia. In the case of a crime victim who is under 18 years

of age, incompetent, incapacitated, or deceased, the legal guardians of the crime victim or the representatives of the crime victim's estate, family members, or any other persons appointed as suitable by the court, may assume the crime victim's rights under this chapter, but in no event shall the defendant be named as such guardian or representative.

(f) PROCEDURES TO PROMOTE COMPLIANCE.—

(1) REGULATIONS.—Not later than 1 year after the date of enactment of this chapter, the Attorney General of the United States shall promulgate regulations to enforce the rights of crime victims and to ensure compliance by responsible officials with the obligations described in law respecting crime victims.

(2) CONTENTS.—The regulations promulgated under paragraph (1) shall—

(A) designate an administrative authority within the Department of Justice to receive and investigate complaints relating to the provision or violation of the rights of a crime victim;

(B) require a course of training for employees and offices of the Department of Justice that fail to comply with provisions of Federal law pertaining to the treatment of crime victims, and otherwise assist such employees and offices in responding more effectively to the needs of crime victims;

(C) contain disciplinary sanctions, including suspension or termination from employment, for employees of the Department of Justice who willfully or wantonly fail to comply with provisions of

Federal law pertaining to the treatment of crime victims; and

(D) provide that the Attorney General, or the designee of the Attorney General, shall be the final arbiter of the complaint, and that there shall be no judicial review of the final decision of the Attorney General by a complainant.

REPLY BRIEF

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IN THE
Supreme Court of the United States

BRIAN RUSSELL DOLAN,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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REPLY BRIEF FOR PETITIONER

The essence of the Government's argument is that restitution under the Mandatory Victims Restitution Act (MVRA) can be imposed at any time, without regard to either the deadlines imposed by the MVRA itself or the law regarding finality in criminal adjudication. The Government acknowledges that "the 90-day provision of Section 3664(d)(5) is a 'deadline, rather than an aspirational admonition,' and that it therefore 'cannot be disregarded by a district court.'" U.S. Br. 10 (quoting Petr. Br. 12). But it then argues the opposite, claiming that a court can change a defendant's criminal sentence to impose restitution long after that sentence has become final.

The Government's argument is unpersuasive. To be sure, the MVRA requires restitution as part of a defendant's punishment. But it is no different from other mandatory sentencing provisions; the law may require a certain punishment, but that punishment must be properly imposed. As this Court confirmed in *Greenlaw v. United States*, 128 S. Ct. 2559 (2008), when a court fails to impose a mandatory sentence (there, a 25-year, rather than a 10-year, prison term, *id.* at 2562-63), that error can be corrected only by following the "dispositive direction regarding sentencing errors" provided by Congress. *Id.* at 2566. A court cannot "'sally forth' on [its] own motion," *id.* at 2565 (quoting *United States v. Samuels*, 808 F.2d 1298, 1301 (8th Cir. 1987) (R. Arnold, J., concurring in denial of reh'g en banc)), to correct errors in disregard of clear statutory directives, compounding its initial error with a second one.

In this case, the district court sallied forth to cure its initial error by imposing restitution long after the statutory deadline. That second error – the only error before this Court – requires reversal.

The Government's approach not only misreads the MVRA, but it dramatically undermines existing doctrine regarding finality and appealability in criminal cases. The Government's proposal for piecemeal litigation is unsupported by precedent, offers no outer boundary on a court's ability to increase a defendant's sentence, and creates constitutional as well as practical difficulties. For all these reasons, it must be rejected.

I. THE "NOTWITHSTANDING" CLAUSE OF 18 U.S.C. § 3663A(a)(1) DOES NOT OVERRIDE THE REQUIREMENTS OF THE MVRA ITSELF.

The Government's primary argument is that the text of the MVRA elevates the duty to impose restitution over all other obligations in the Act. The first sentence of Section 3663A begins "Notwithstanding any other provision of law . . . ." 18 U.S.C. § 3663A(a)(1). The Government argues that these words mean that courts retain the power to impose restitution even after the 90-day deadline of Section 3664(d)(5) has expired. U.S. Br. 13. The Government's interpretation fails for two principal reasons. First, it misreads the notwithstanding clause, and second, it proves too much: if taken seriously, it would undermine the entire statutory structure.

1. The Government focuses on the word "notwithstanding" to the exclusion of the word "other."

The phrase "notwithstanding any *other* provision of law" means what it says. If any *other* law conflicts with Section 3663A, the MVRA supersedes *that* law. For example, absent Section 3663A(a)(1), a court's restitution decisions would be discretionary. *See* 18 U.S.C. § 3663 (providing that courts "may order" restitution in specified cases); *id.* § 3553 (directing courts to consider a number of factors in determining the sentence to be imposed); *United States v. Gordon K.*, 257 F.3d 1158, 1162 n.2 (10th Cir. 2001). Section 3663A(c) removes that discretion for cases within its ambit. So courts can no longer, for example, consider the defendant's ability to pay or the interests of third parties other than the victim.

But "notwithstanding any other provision of law" does not mean "notwithstanding *this* provision." Section 3663A *itself* requires compliance with the procedures in Section 3664. 18 U.S.C. § 3663A(d) ("An order of restitution under this section shall be issued and enforced in accordance with section 3664."). As this Court recently reiterated, "[a] specific provision . . : controls one[s] of more general application." *Bloate v. United States*, No. 08-728, slip op. at 10 (Mar. 8, 2010) (alterations in original) (quoting *Gozlon-Peretz v. United States*, 498 U.S. 395, 407 (1991)). Here, the specific language of Section 3663A(d) requiring compliance with Section 3664 controls over the general language of Section 3663A(a)(1).

The Government's reading also ignores the words that immediately follow the "notwithstanding" clause: courts are directed to impose restitution "when sentencing a defendant." 18 U.S.C.

§ 3663A(a)(1). Under the Government's reading, the statute should have stated "when sentencing a defendant or at any time thereafter." But Congress did not say that. This Court should not insert new words into the MVRA while disregarding existing ones.

2. Taken seriously, the Government's interpretation of the "notwithstanding" clause proves too much. The Government provides no rationale for singling out the 90-day deadline from other mandatory provisions of the MVRA. If the Government is right about courts' authority – indeed, obligation – to provide restitution after the 90-day deadline has passed, then why does it concede that the 60-day deadline's restrictions in Section 3664(d)(5) *do* bind the district court? *See* U.S. Br. 18. Similarly, if the Government's reading is correct, a court should order restitution even if the Government fails to meet its burden of proof under Section 3664(e). And why stop at overriding deadlines within the MVRA? For example, the Government's reading would require courts of appeals to disregard failures to file timely notices of appeal if restitution is at stake. The "notwithstanding" clause cannot be understood to override everything. Congress "does not, one might say, hide elephants in mouseholes." *Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 468 (2001).

II. A MANDATORY RESTITUTION TERM, LIKE ANY OTHER MANDATORY PUNISHMENT, CAN BE IMPOSED ONLY WITHIN THE TIME AUTHORIZED BY LAW.

The Government is simply wrong to claim that Section 3664(d)(5) "is a procedural regulation, not a criminal statute." U.S. Br. 20 n.2. Congress located the MVRA in Title 18 ("Crimes and Criminal Procedure"). The statute repeatedly refers to "sentence[s]" and "sentencing." *See, e.g.*, 18 U.S.C. § 3663A(a)(1), (b)(1)(B)(i)(II), (c)(1), (c)(3)(B); *id.* § 3664(d)(1), (d)(2)(A)(iv), (d)(5), (*o*), (*o*)(1). The foundation of this Court's decision in *Hughey v. United States*, 495 U.S. 411 (1990), is that restitution operates, and is intended to operate, as part of a criminal sentence. *See* Petr. Br. 27 n.13, 39; J.A. 48 (denominating the restitutionary term of a judgment a "criminal monetary penalt[y]").[1]

Federal criminal sentences are subject to a variety of constraints. These include strict time limits on courts' ability to amend or correct sentences once pronounced. The MVRA modifies those limits only in a narrow way. Its timing requirements can easily be met, as they are in virtually every case. In this case,

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[1] The courts of appeals overwhelmingly agree that restitution is a criminal punishment. *See, e.g., United States v. Ziskind*, 471 F.3d 266, 270 (1st Cir. 2006), *cert. denied*, 549 U.S. 1316 (2007); *United States v. Perez*, 514 F.3d 296, 298 (3d Cir. 2007); *United States v. Hayes*, 32 F.3d 171, 172 (5th Cir. 1994); *United States v. Sosebee*, 419 F.3d 451, 461 (6th Cir. 2005); *United States v. Ross*, 279 F.3d 600, 609 (8th Cir. 2002); *United States v. Dubose*, 146 F.3d 1141, 1144 (9th Cir.), *cert. denied*, 525 U.S. 975 (1998).

however, they were not. That the MVRA is mandatory provides no excuse for these failures.

1. Federal law refers to the sentence for an offense in the singular. *See, e.g.*, 18 U.S.C. § 3553(a) ("[t]he court shall impose *a* sentence" that complies with various criteria) (emphasis added); Fed. R. Crim. P. 32(k) (the judgment should contain "*the* sentence") (emphasis added). The components of a sentence interact with one another. In determining a sentence "sufficient, but not greater than necessary" to achieve Congress's varied purposes, 18 U.S.C. § 3553(a), a court is directed to consider, among other things, the relationship between any fine it might impose and whatever restitution it will order. *See id.* § 3572(b) (directing a court to "impose a fine or other monetary penalty only to the extent that such fine or penalty will not impair the ability of the defendant to make restitution"). Similarly, the amount of harm or loss to the victim (with a few differences) will inform both the recommended length of imprisonment under the Sentencing Guidelines and the amount of restitution. *See* 18 U.S.C. § 3663A(b) (stating that the restitution order turns on "damage to or loss or destruction of property" and "bodily injury"); U.S.S.G. § 2B1.1 (2009) (detailing offense levels based on amount of loss).

2. The Federal Rules of Criminal Procedure provide the framework for imposing a sentence and entering judgment. Following conviction, preparation of a presentence report, and an opportunity to object to the contents of the report, *see* Fed. R. Crim. P. 32(c)-(g), the judge must pronounce sentence on the defendant in open court, Fed. R. Crim. P.

43(a)(3). The court having pronounced sentence, Rule 32(k) directs it to "set forth the plea, the jury verdict or the court's findings, the adjudication, and the sentence" in a written judgment. The judge then "must sign the judgment, and the clerk must enter it." *Id.* That sentence constitutes a final judgment.

Once a sentence is imposed, federal law sharply limits judicial authority to correct it. The district court itself has only fourteen days to do so, running from "the oral announcement of the sentence." *See* Fed. R. Crim. P. 35(a), (c). Rule 35 was amended expressly to limit the period within which district courts retain the power to correct a sentence: a prior version of the rule permitted correction "at any time." The "vast majority" of courts of appeals have treated the rule's time limit as jurisdictional. *United States v. Shank*, 395 F.3d 466, 469-70 (4th Cir.) (surveying the caselaw), *cert. denied*, 544 U.S. 1062 (2005).

Federal law also strictly limits the time within which a sentence can be appealed. *See* Fed. R. App. P. 4(b) (defendants must file a notice of appeal "within 14 days," and the Government "within 30 days," after either the entry of judgment or the filing of a notice by the opposing party). These time limits, too, are strictly enforced. *See Coppedge v. United States*, 369 U.S. 438, 441-42 (1962). Absent a timely appeal, the sentence cannot later be corrected (except, under limited circumstances, through the habeas process).

This rule that sentences can be corrected only through the processes Congress has provided operates even in cases involving mandatory terms, as this Court's recent decision in *Greenlaw v. United*

States, 128 S. Ct. 2559 (2008), shows. *Greenlaw* held that neither litigants *nor courts themselves* can correct errors in a defendant's sentence – including the error of failing to impose a required prison term – except through the procedures provided by law. *See id.* at 2569.

3. The MVRA requires that restitution as a criminal punishment be imposed "when sentencing a defendant," 18 U.S.C. § 3663A(a)(1) – not at some other time of the court's, the Government's, or the victim's choosing. Thus, as the Government recognizes, courts will generally impose restitution at the same time that they pronounce the other elements of a defendant's sentence. *See* U.S. Br. 26. But the MVRA provides a limited authorization for courts to change a defendant's sentence to include restitution beyond the 14 days that might be provided by Fed. R. Crim. P. 35(a). If the victim's losses are not yet ascertainable, Section 3664(d)(5) permits the court to nonetheless proceed with the other parts of the sentence, and directs the court to "set a date for the final determination of the victim's losses, not to exceed 90 days after sentencing." Thus, when a court complies with the MVRA, it will impose restitution "when sentencing a defendant," or within 90 days thereafter. *Id.*

Section 3664(d)(5) also provides a distinctive pathway for amending a restitution order after it has been imposed. If a victim "subsequently discovers further losses," and can show "good cause" for not having included them "in the initial claim for restitutionary relief," he has 60 days to "petition the court

for an amended restitution order." *Id.*[2] But the 90-day and 60-day rules do not mean that Congress silently repealed the limits contained in Fed. R. Crim. P. 35(a) and Fed. R. App. P. 4(b).

4. There are numerous opportunities within the rules to ensure that restitution occurs by the MVRA's deadlines. In this case, neither the Government nor the courts below ever identified any obstacle that would have prevented compliance. U.S. Br. 14, 26; *see also* J.A. 56 (court stating "I'm not sure why we're just getting together today when we had this information back in October").

Instead, there were a series of omissions. Neither the Government nor the probation office met its responsibilities under Section 3664(d)(5) to inform the court "10 days prior to sentencing" that the victim's losses had not yet been ascertained. Only at sentencing did the Government inform the court that the amount had not been determined. J.A. 34-35.

There, the district court announced an intention to "just leave the question of restitution open-ended,"

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[2] Under the MVRA, victims also possess a number of procedural opportunities. *See, e.g.*, 18 U.S.C. § 3664(d)(2) (requiring the probation officer to provide various information to victims and to provide an opportunity for them to submit information about their losses); *id.* § 3664(m)(1)(B) (providing assistance to victims in obtaining the restitution due to them). 18 U.S.C. § 3771, commonly known as the Crime Victims' Rights Act (CVRA), provides victims various rights to participate in the sentencing process. The CVRA recognizes, however, that a victim's "right to full and timely restitution" is only "as provided in law," 18 U.S.C. § 3771(a)(6), thus locating that right within existing practices. *See In re W.R. Huff Asset Mgmt. Co.*, 409 F.3d 555, 563 (2d Cir. 2005).

J.A. 35, rather than "set[ting] a date," as Section 3664(d)(5) directs. The Government did not ask the court to set a date, either then or ever. Nor did it seek relief within the time provided by Fed. R. Crim. P. 35(a) for seeking correction after "oral announcement of the sentence," Fed. R. Crim. P. 35(c).

Later, in October 2007, the probation office received additional information regarding the medical bills, and informed the Government and the court that Section 3664(d)(5)'s deadline would run on October 28, 2007. J.A. 52. But the court still failed to set a date, and the Government continued to sit on its hands.

Finally, on October 28, 2007, the August 8, 2007, judgment became final by operation of law. *See* Petr. Br. 29-30. The Government might have appealed that judgment within thirty days, Fed. R. App. P. 4(b)(1)(B), seeking to excuse its inaction until then on the ground that the now-final sentence constituted plain error under Fed. R. Crim. P. 52(b) for not requiring restitution. Again, however, the Government did nothing, allowing the time to file its appeal to expire.

In light of the numerous opportunities to obtain full restitution for the Indian Health Service[3] in compliance with the MVRA, the Government should not now be heard to argue that the district court should have ordered restitution in the face of the MVRA's deadline.

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[3] Contrary to the implication of amicus curiae, *see* Br. of Amicus Curiae Nat'l Crime Victim Law Inst. at 18, the record suggests that the direct victim has not continued to seek restitution. *See* J.A. 27, 34-35.

5. As petitioner pointed out in his opening brief, Section 3664(d)(5) is a claims-processing statute. *See* Petr. Br. 24-28. The Government offers two responses. First, it suggests petitioner did not properly preserve this argument. *See* U.S. Br. 21 (claiming that petitioner instead argued that Section 3664(d)(5) is "jurisdictional"). Second, it suggests that because the Section directs courts (rather than litigants) to meet a deadline, it somehow cannot be a claims-processing rule. *See id.* at 23-24. Neither argument is persuasive.

Petitioner has already explained in detail that his position below is fully consistent with his argument here. Pet. Reply 2-4. Indeed, for all that the Government criticizes petitioner for sometimes using the word "jurisdictional," the Government itself called the 90-day deadline "quasi-jurisdictional" before the court of appeals.[4]

Moreover, the Government's purported distinction between rules directed at litigants and those directed at courts misses the point. While setting a date within 90 days of sentencing for final determination of restitution can be done only by a court, the overall structure of Section 3664(d) shows that the Government is in fact presenting a claim – albeit one for the benefit of the victim. The title of Section 3664 ("Procedure for issuance and enforcement of order of restitution") and the final words of Section 3664(d)(5) (referring to "the initial claim for restitutionary

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[4] This language was used by the attorney for the Government at oral argument. Audio recording (MP3): oral argument in *United States v. Dolan*, held by 10th Circuit Court of Appeals, at 18:55 (Jan. 16, 2009).

relief") reinforce this conclusion. Whether a rule declares an "emphatic time prescription[]" that creates a "definite end to proceedings," *Eberhart v. United States*, 546 U.S. 12, 18, 19 (2005) (per curiam) (quoting *Kontrick v. Ryan*, 540 U.S. 443, 454 (2004)), does not depend on whom it binds. The Government thus errs in suggesting that such inflexible timing rules matter only if they set deadlines "by which a *litigant* must file a particular pleading or claim." U.S. Br. 24.

III. THE GOVERNMENT'S APPROACH IS INCONSISTENT WITH A PROPER UNDERSTANDING OF FINALITY, AND IS UNWORKABLE AND CONSTITUTIONALLY PROBLEMATIC.

This Court has repeatedly held that defendants in criminal cases can appeal only from final judgments. *See* Petr. Br. 29. In a criminal case, "a judgment or decision is final for the purpose of appeal only when it terminates the litigation between the parties on the merits of the case, and leaves *nothing* to be done but to enforce by execution what *has been determined*." *Parr v. United States*, 351 U.S. 513, 518 (1956) (emphasis added) (quotation marks omitted).

In many cases, as in petitioner's, a defendant is subject to a term of imprisonment, a fine, an order to pay restitution, and more. His sentence is not final until the court determines each of these components. A defendant sentenced to a term of imprisonment by a court that also announces a plan to impose restitution in the future would not satisfy the standard announced in *Parr*. Thus, he could not appeal.

The Government suggests the contrary. Even if mandatory restitution has not yet been imposed, and the judge intends to determine it later, the Government claims that "as soon as a district court imposes [a prison] sentence and issues a judgment reflecting that sentence, the judgment is appealable." U.S. Br. 25. That is wrong. Rule 4(b) and *Berman v. United States*, 302 U.S. 211, 212 (1937) – the authorities the Government cites – permit appeal of *final* judgments. But the sentence cannot be final while one of its component terms remains undecided.

The Government resorts to its novel view of appealability because it recognizes that *not* permitting a defendant to appeal his conviction or incarceration until restitution has been ordered – if there is limitless time to do so – poses practical and constitutional difficulties. But those difficulties can be avoided by adopting petitioner's plain-language interpretation.

1. Requiring that restitution be ordered within 90 days of sentencing simplifies the appeals process. Under petitioner's interpretation, the entirety of a criminal sentence, restitution and all, becomes determinate no later than 90 days after sentencing.[5]

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[5] The potential for later amendment of the order under the 60-day provision of Section 3664(d)(5) does not undermine the finality of the initial judgment. In Section 3664(*o*)(1)(C), Congress provides that a "sentence that imposes an order of restitution is a final judgment notwithstanding the fact" that it can subsequently be "amended under subsection (d)(5)." By contrast, in Section 3664(d)(5), Congress included the word "final" in its articulation of the potential 90-day extension for determining restitution, thereby indicating that it intended for there to be a final, appealable judgment within 90 days after sentencing.

The appellate process is then straightforward. Even a defendant whose restitution order takes place under the 90-day extension might file a notice of appeal after the initial sentencing and then an amended notice of appeal after the restitution order. (The first notice, however, would be premature, and thus protective, not effective.) Once the intended components of the sentence are all imposed, the judgment will be final. *See United States v. Lianidis*, 2010 U.S. App. LEXIS 5737, at *9 n.4 (3d Cir. Mar. 19, 2010) (judgment not final until six months after sentencing, when court entered an agreed order for criminal forfeiture). Under the Government's theory, on the other hand, two separate appeals result, with at best a hope for later consolidation. U.S. Br. 26.

2. The Government never tells this Court when, precisely, final judgment occurs in a case like petitioner's. If it occurs when his sentence of incarceration is reduced to a judgment, then he not only can, but presumably *must*, file his appeal of his conviction and partial sentence within fourteen days under Fed. R. App. P. 4(b). But under the Government's view, the restitution order will *also* be a final judgment, creating two such judgments in a single case. That cannot be. As this Court long ago stated, "[t]o say that there can be *two* final judgments" in a single case "involves a solecism." *Brooklyn Ins. Co. v. Dunn*, 86 U.S. 214, 225 (1874); *see also United States v. Booker*, 436 F.3d 238, 245 (D.C. Cir. 2006) (applying this rule to criminal sentencing); Petr. Br. 31-32.

Worse yet, the Government's position would often generate repetitive, and potentially conflicting, consideration of related issues. As petitioner explained earlier, a victim's losses will often be relevant to calculate both the term of imprisonment and the amount of restitution. *See supra* p. 6. The Government, however, would permit a sentencing court to order an imprisonment sentence or a fine while leaving restitution open indefinitely. An appellate court faced with an appeal involving only the prison sentence might be unable to assess the reasonableness of the sentence as a whole, due to not knowing the amount of restitution, *see* 18 U.S.C. § 3553(a)(7); it would thus be unable to decide the appeal that the Government posits should be filed. From the district court's perspective, problems would arise in ordering restitution after other components of the sentence have been appealed. If a defendant has appealed the issue of loss, as calculated for Guidelines purposes, a district court would be rightly hesitant to order restitution without waiting for the appellate decision. Or the court might discover, when it was too late, that it should have chosen to put the defendant on probation with community confinement and work release, *see* 18 U.S.C. § 3563(b)(11), (19), rather than impose a short sentence of imprisonment, in order to facilitate the earning of money to pay restitution. And under Section 3572(b), as noted, the determination of restitution could retroactively render the fine unlawfully excessive.

Thus, indefinitely severing restitution from the other parts of a sentence creates problems absent from *Budinich v. Becton Dickinson & Co.*, 486 U.S.

196 (1988), the civil case that the Government claims would allow piecemeal litigation here. There, the Court observed that "disassociated" civil judgments – such as judgments on liability and attorney's fees – are separately appealable because one claim "is *independent of*, and *unaffected by*, another . . . with which it happens to be entangled." *Id.* at 202 (emphasis added). But restitution is not independent of other sentencing issues.

3. The Government's attempt to read defendants' rights entirely out of the MVRA is incompatible with the fact that the Act is a criminal sentencing statute. The legislative history undermines the Government's contention that Congress had "no interest in protecting *defendants* from delays in awarding restitution" when it enacted the MVRA. U.S. Br. 20. That is not what Congress said. *See* Petr. Br. 37 (quoting S. Rep. No. 104-179, at 20 (1995)).

Congress sensibly built a firm deadline for restitution orders into the MVRA. Such a deadline serves as a bright-line mechanism for steering clear of constitutional problems. Under the Government's interpretation, there are no limits to how late the sentencing court may order restitution. It is blind to the double jeopardy and due process problems that could result. Due process problems can arise, for example, from erosion of evidence, or from the inability of the defendant to assist in his defense if his place of imprisonment is distant from the sentencing court. *See* Br. of Amicus Curiae Nat'l Ass'n of Crim. Def. Lawyers (NACDL) at 4-14; Petr. Br. 30-33, 37-38. And double jeopardy problems would arise if, as

the Government would apparently permit, a court were to impose restitution long after a defendant has completed the rest of his sentence. *See Jones v. Thomas*, 491 U.S. 376, 385 (1989); *Ex parte Lange*, 85 U.S. 163, 168-73, 176 (1874).

4. Finally, as petitioner explained in his opening brief, Petr. Br. 38-39, victims as a class are best served by rules that require restitution to be ordered in compliance with the 90-day deadline. The MVRA and CVRA together provide victims with a panoply of tools for assuring that their interests will be fully respected within the timeframe set out by Section 3664. Those time limits provide a victim with closure and enable him to know, after a clear date, whether he will need to file a civil suit. *See* Br. of Amicus Curiae NACDL at 16-17. By contrast, under the Government's proposal, there may be a temptation to place a final determination of restitution on the back burner. This will be especially true in cases where indigent defendants have no realistic prospect of paying the amount involved, *see* J.A. 68-70; Matthew Dickman, Comment, *Should Crime Pay?: A Critical Assessment of the Mandatory Victims Restitution Act of 1996*, 97 Cal. L. Rev. 1687, 1694 (2009) (describing empirical studies), and the case involves substantial terms of imprisonment and complex loss calculations. Treating Section 3664(d)(5) as a firm deadline avoids leaving victims in this uncertain position.

IV. IN LIGHT OF THE IMPORTANCE OF FINALITY TO CRIMINAL SENTENCING, THE GOVERNMENT'S DEPENDENCE ON *MONTALVO-MURILLO* IS MISPLACED.

In suggesting that district courts retain their authority to add restitution to a defendant's sentence after the 90-day deadline has expired, the Government turns to cases involving agency action that do not treat timing requirements as restrictions on an agency's power. *See* U.S. Br 10-11. The Government then aggressively claims that the same forgiving standard "applies even when the relevant 'agency' is a federal court and the underlying proceeding is a criminal case." *Id.* at 11. It cites no case for this proposition, for indeed, there is none. Instead, it relies on a single case, *United States v. Montalvo-Murillo*, 495 U.S. 711 (1990), to bridge the gap.

Montalvo-Murillo cannot bear this weight. Most significantly, the finality concerns that animate deadlines governing criminal sentencing play no part in the provisional, regulatory determination of pretrial detention. In addition, the concerns that militated against releasing a pretrial detainee upon a violation of the Bail Reform Act's first appearance requirement cut the other way when it comes to violations of sentencing deadlines.

Montalvo-Murillo involved a preliminary determination under the Bail Reform Act of 1984, which provided in part that a hearing to determine eligibility for pretrial release "shall be held immediately upon the person's first appearance before [a] judicial officer." 495 U.S. at 714. The defendant was arrested

in New Mexico on a Wednesday, voluntarily transferred to Chicago to participate in a controlled drug delivery the next day, and then returned to New Mexico Friday night, appearing in court in Chicago and New Mexico in the process. *Id.* at 714-15. In the midst of his whirlwind travels, he did not receive a bail hearing at his "first appearance." This Court rejected his argument that the remedy for that failure should be automatic release from custody. *Id.* at 717.

1. Bail is not an area where finality plays an important role. The Government itself recognized this in *Montalvo-Murillo*, where it contrasted the deadlines for filing appeals contained in Fed. R. App. P. 4, which it said "must be strictly observed to assure the finality of judgments," with the timing rules in the Bail Reform Act, which it said "serve an entirely different purpose." U.S. Reply Br. at *17, 1990 U.S. S. Ct. Briefs LEXIS 1412, *Montalvo-Murillo*, 495 U.S. 711 (1990).

Finality, however, *is* central to sentencing. *See supra* pp. 12-14; Petr. Br. 28-33. Treating the 90-day deadline as a limit on courts' sentencing power is necessary to achieve finality. Therefore, under the Government's own analysis in *Montalvo-Murillo*, the MVRA's deadline cannot be analogized to the first-appearance requirement.

Moreover, bail determinations, unlike sentences, are understood to be provisional. The Bail Reform Act explicitly provides that a bail hearing "may be reopened, before or after a determination by the judicial officer, *at any time before trial*" if conditions change. 18 U.S.C. § 3142(f)(2)(B) (emphasis added).

By contrast, a sentence can only be amended under limited circumstances. *See supra* pp. 7-8.

2. Bail determinations differ from sentencing in a number of other ways. As this Court recognized in *Montalvo-Murillo*, bail is a "regulatory device" intended to maintain the status quo pending a criminal trial. 495 U.S. at 719. Bail determinations often "take place during the disordered period following arrest," *id.* at 720, which may make punctilious adherence to tight timing rules difficult. By contrast, criminal sentencing is by definition punitive and comes at the end of criminal proceedings. The MVRA's procedures under Section 3664 for issuing and enforcing restitution take place in an orderly environment that offers ample time for compliance. Thus, it is simply *not* "inevitable" that "errors in the application of the time requirements of [the MVRA] will occur." *Montalvo-Murillo*, 495 U.S. at 720. The "most diligent efforts of the Government and the courts" would almost certainly ensure compliance with the MVRA's deadlines. *Id.*[6]

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[6] Notably, the Government never argues here, as it did in *Montalvo-Murillo*, that complying with the MVRA presents any practical difficulties. *See* U.S. Br. at *28, 1989 U.S. S. Ct. Briefs LEXIS 1156, *Montalvo-Murillo*, 495 U.S. 711 (1990) ("Occasional procedural errors in the handling of detention hearings are inevitable, particularly since the Bail Reform Act requires the parties and the court to act with great dispatch in the often chaotic period following a defendant's arrest."); U.S. Reply Br. at *9-10, 1990 U.S. S. Ct. Briefs LEXIS 1412, *Montalvo-Murillo*, 495 U.S. 711 (1990) ("And, because detention proceedings are invariably conducted during the often-chaotic period immediately following a defendant's arrest, it is likely that minor errors in the application of the time limits of Section 3142(f) will continue to be made in a significant number of

3. Finally, the consequences of ordering automatic release are quite different from the consequences of limiting district courts' sentencing authority to the period expressly provided for by the MVRA. In the bail context, if courts are disabled from detaining defendants once there has been a violation of the first appearance requirement, then there is no alternative way to provide for public safety and to ensure defendants' appearances. Nor, under Montalvo-Murillo's theory, could the Government have obtained a hearing by appealing the district court's failure to hold a hearing at the first appearance.

The consequences here are quite different. Even after a court fails to order mandatory restitution within the period provided by Section 3664(d)(5), relief is available. As petitioner explained above, the Government can file a timely appeal. *See supra* p. 10.[7] And of course, victims retain their preexisting ability to seek restitution through the civil justice system. *See* 18 U.S.C. § 3664(*l*) (estopping defendants from denying the essential allegations of their offenses in suits brought by victims).[8]

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cases, despite the best efforts of agents, prosecutors, and magistrates.").

[7] In some cases, victims themselves could potentially seek mandamus under the CVRA. *See* 18 U.S.C. § 3771(d)(3).

[8] Indeed, to the extent that determining restitution in some drug- or property-crime cases "would complicate or prolong the sentencing process to a degree that the need to provide restitution to any victim is outweighed by the burden on the sentencing process," 18 U.S.C. § 3663A(c)(3)(B), the MVRA permits courts to leave victims to the civil process. (That provision does not apply here.)

V. HARMLESS ERROR ANALYSIS DOES NOT APPLY TO VIOLATIONS OF SECTION 3664(d)(5).

As petitioner explained in his opening brief, defendants subject to restitution orders that violate Section 3664(d)(5)'s deadline are like defendants subject to prosecution after the statute of limitations has run. Each is entitled to reversal without proving prejudice in his individual case. Petr. Br. 46.[9]

The Government's "harmless error" argument is premised on a fallacy – it points to the wrong event as the "error." Petitioner does not complain of the *failure* to impose restitution *within* the allowable 90-day extension period, but rather challenges the *imposition* of restitution *after* the allowable period had expired.

The Government's citations to cases in which this Court "applied harmless-error analysis to errors involving sentencing," U.S. Br. 30, are inapposite. Unlike the court here, which lost sentencing authority once Section 3664(d)(5)'s deadline passed, the sentencing courts in the Government's cases retained the authority to impose a sentence, but made mistakes in determining what the sentence should be. For example, in *Washington v. Recuenco*, 548 U.S. 212 (2006), this Court applied harmless error analysis to *Blakely* violations because it would be possible

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[9] Petitioner does not dispute that a defendant can waive or fail properly to preserve his objections to a restitution order that violates Section 3664(d)(5), just as a defendant can waive objections to a prosecution in violation of a statute of limitations.

to determine that a properly instructed jury would have found facts sufficient to justify the sentence. Similarly, a decision that imposes a sentence based on an impermissible reason is reviewed for harmless error because it is possible that the court could have imposed that same sentence based on permissible reasons. *Williams v. United States*, 503 U.S. 193, 204 (1992); *see also Jones v. United States*, 527 U.S. 373, 402 (1999) (a court is authorized to impose a sentence based on an invalid factor if "absent [the] invalid factor, the jury would have reached the same verdict"). But here, absent the error of acting to order restitution when it had no authority to do so, the district court could *not* have ordered restitution.

None of the Government's cases involved violations of "firm deadlines." By contrast, *Greenlaw v. United States*, 128 S. Ct. 2559 (2008), which the Government does not cite, *did* involve one. *Id.* at 2569. In *Greenlaw*, the Court vacated the circuit court's sua sponte increase of a sentence to conform to a mandatory minimum. *Id.* at 2570. The amicus curiae this Court appointed in support of the circuit court's judgment did not even suggest that harmless error analysis could apply. Nor did the Court raise that possibility. Instead, the Court found that the defendant could not be subject to the otherwise mandatory sentence because the "strict time limits on notices of appeal and cross-appeal" had expired. *Id.* at 2569. In other words, once the deadline for filing a notice of cross-appeal had expired, the defendant acquired a right: the right to "proceed anticipating that the appellate court will not enlarge his sentence." *Id.*

In this case, the 90-day deadline of Section 3664(d)(5) operates in the same way: once it passes, the defendant's sentence becomes final. The sentencing court loses authority to subsequently reopen the sentence and impose a restitution order. When it nevertheless does so, it commits an error which is not harmless to the defendant.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

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APPENDIX

APPENDIX

1. Fed. R. Crim. P. 35 ("Correcting or Reducing a Sentence") provides, in pertinent part:

(a) Correcting Clear Error. Within 14 days after sentencing, the court may correct a sentence that resulted from arithmetical, technical, or other clear error. . . .

(c) "Sentencing" Defined. As used in this rule, "sentencing" means the oral announcement of the sentence.

2. Fed. R. App. P. 4 ("Appeal as of Right – When Taken") provides, in pertinent part:

(b) Appeal in a Criminal Case.

(1) *Time for Filing a Notice of Appeal.*

(A) In a criminal case, a defendant's notice of appeal must be filed in the district court within 14 days after the later of:

(i) the entry of either the judgment or the order being appealed; or

(ii) the filing of the government's notice of appeal.

(B) When the government is entitled to appeal, its notice of appeal must be filed in the district court within 30 days after the later of:

(i) the entry of the judgment or order being appealed; or

(ii) the filing of a notice of appeal by any defendant.

(2) *Filing Before Entry of Judgment.* A notice of appeal filed after the court announces a decision, sentence, or order – but before the entry of the judgment or order – is treated as filed on the date of and after the entry.

(3) *Effect of a Motion on a Notice of Appeal.*

(A) If a defendant timely makes any of the following motions under the Federal Rules of Criminal Procedure, the notice of appeal from a judgment of conviction must be filed within 14 days after the entry of the order disposing of the last such remaining motion, or within 14 days after the entry of the judgment of conviction, whichever period ends later. This provision applies to a timely motion:

(i) for judgment of acquittal under Rule 29;

(ii) for a new trial under Rule 33, but if based on newly discovered evidence, only if the motion is made no later than 14 days after the entry of the judgment; or

(iii) for arrest of judgment under Rule 34.

(B) A notice of appeal filed after the court announces a decision, sentence, or order – but before it disposes of any of the motions referred to in Rule 4(b)(3)(A) – becomes effective upon the later of the following:

(i) the entry of the order disposing of the last such remaining motion; or

(ii) the entry of the judgment of conviction.

(C) A valid notice of appeal is effective – without amendment – to appeal from an order disposing of any of the motions referred to in Rule 4(b)(3)(A).

(4) *Motion for Extension of Time.* Upon a finding of excusable neglect or good cause, the district court may – before or after the time has expired, with or without motion and notice – extend the time to file a notice of appeal for a period not to exceed 30 days from the expiration of the time otherwise prescribed by this Rule 4(b).

(5) *Jurisdiction.* The filing of a notice of appeal under this Rule 4(b) does not divest a district court of jurisdiction to correct a sentence under Federal Rule of Criminal Procedure 35(a), nor does the filing of a motion under 35(a) affect the validity of a notice of appeal filed before entry of the order disposing of the motion. The filing of a motion under Federal Rule of Criminal Procedure 35(a) does not suspend the time for filing a notice of appeal from a judgment of conviction.

(6) *Entry Defined.* A judgment or order is entered for purposes of this Rule 4(b) when it is entered on the criminal docket.

AMICUS CURIAE BRIEF

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Supreme Court of the United States

BRIAN RUSSELL DOLAN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to
the United States Court of Appeals
for the Tenth Circuit

BRIEF FOR THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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March 2010

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Interest Of *Amicus Curiae*

The National Association of Criminal Defense Lawyers ("NACDL") is a nonprofit professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crimes or misconduct.[1] Founded in 1958, NACDL has a membership of more than 11,000 and affiliate memberships of almost 40,000. NACDL's members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. The American Bar Association recognizes NACDL as an affiliated organization and awards it full representation in its House of Delegates.

NACDL has participated as *amicus* in many of the Court's most significant criminal cases. In many such cases, as in this one, NACDL has sought to ensure that criminal defendants receive proper procedural protections during criminal sentencing.

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[1] Each party has consented to the filing of this brief. Pursuant to Rule 37.6, counsel for *amicus curiae* states that no party's counsel authored this brief in whole or in part and that no party or party's counsel made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

Summary Of Argument

The Mandatory Victims Restitution Act ("the Act"), which sets forth procedures governing the award of restitution to victims of federal crimes, provides that "the court shall set a date for the final determination of the victim's losses, not to exceed 90 days after sentencing." 18 U.S.C. § 3664(d)(5). In holding that the Act permits an award of restitution even when that determination is made well past "90 days after sentencing," the Tenth Circuit undermined the Act's purposes in several respects: the decision deprives defendants of critical procedural protections and also imposes undue burdens on victims and the courts.

First, in assuming that the 90-day limit protected only victims, the Tenth Circuit overlooked the important protections that the 90-day limit affords to criminal defendants. Of greatest importance, the 90-day deadline protects defendants against the loss or erosion of evidence necessary to contest the government's restitution demand. The loss of evidence is of particular concern in restitution hearings, because many courts have held the government to a modest burden of proof, and because some courts have required defendants to come forward with affirmative evidence—even on questions, such as offsets, in which the evidence is uniquely in the victim's possession or on issues that go well beyond those contested at trial. Moreover, delays may push restitution hearings until after defendants have been sent to federal prison—often hundreds of miles away from their counsel—leaving them unable to assist in this phase

of their defense. Delays also subject defendants to needless anxiety and uncertainty, which can interfere with their rehabilitation; they also force the defendant to choose between, on the one hand, filing premature appeals before a final sentence, and, on the other hand, delaying their appeals indefinitely as they await a restitution order. And, contrary to the Tenth Circuit, defendants do not benefit financially from delay; courts regularly require defendants to pay prejudgment interest as part of restitution awards.

Second, the Tenth Circuit's decision undermines the other important purposes advanced by the Act's time limits. In eliminating incentives for the government and the court to address restitution promptly, the decision makes it less likely that victims will receive their restitution promptly and when it is of greatest use. Delays in ordering restitution also reduce its deterrent value and burden both federal and state courts with duplicative litigation.

In sum, the Tenth Circuit's interpretation of the Act would undermine congressional purpose and imposes substantial burdens on defendants, victims, and the courts. The decision should be reversed.

Argument

I. The Tenth Circuit's Interpretation of The Mandatory Victims Restitution Act Would Deprive Criminal Defendants of Important Procedural Protections.

In holding that Mr. Dolan could be subjected to a restitution order after the 90-day deadline for calculating restitution, the Tenth Circuit asserted that the Act's "emphasis on the need for speed and finality arises out of concern for victims, not victimizers." Pet. App. 16a. The Tenth Circuit was also unable to conceive "how a defendant might be prejudiced by an untimely restitution order." Pet. App. 20a. Yet Congress inevitably recognized that untimely restitution orders can prejudice defendants in multiple ways, and that the 90-day limit provides defendants with important safeguards.

A. Delayed restitution determinations increase the risk that defendants will lose access to necessary evidence.

In asserting that the 90-day limitation serves to protect victims only, the Tenth Circuit overlooked its importance in ensuring that a defendant has access to evidence necessary to contest a restitution demand. As part of the criminal sentence, 18 U.S.C. § 3556, an award of restitution is both a "sanction," *id.* § 3551(b), and a "penalty," *id.* § 3663A(a)(1). The legislative history reflects the Act's concern with protecting defendants' constitutional "right not to be sentenced on the basis of inva-

lid premises or inaccurate information." S. Rep. No. 104-179 (1995), at 18.

But with the Act "streamlining the process" for issuing orders of restitution, *id.*, the need to prevent the erosion of evidence due to delay is all the more important to protect defendants' right to due process. Here, the 90-day limitation acts as a mandatory claim-processing rule, which, like a statute of limitations, "typically rests, in large part, upon evidentiary concerns—for example, concern that the passage of time has eroded memories or made witnesses or other evidence unavailable." *Stogner v. California*, 539 U.S. 607, 615–16 (2003). In refusing to enforce the Act's 90-day limitation, the Tenth Circuit overlooked this important protection.

1. Defendants' access to evidence is critical in the context of restitution. Congress and courts have not required the government to prove the entitlement to and amount of restitution beyond a reasonable doubt. 18 U.S.C. § 3664(e); *United States v. Dupes*, 513 F.3d 338, 345 (2d Cir. 2008) ("[T]here is no constitutional requirement that the facts needed for the district court's fashioning of a restitution order be found by a jury beyond a reasonable doubt.") (quotation omitted); *United States v. Miller*, 419 F.3d 791, 792 (8th Cir. 2005) ("The government has the burden of proving the amount of restitution by a preponderance of the evidence.").

The defendant's need for access to evidence is especially great because the defendant often lacks the opportunity to confront the government's evidence directly through cross-examination. *See, e.g., United*

States v. Smith, 528 F.3d 423, 425 (5th Cir. 2008) ("We reject Smith's argument that the Government was required to present live testimony or a sworn affidavit from the victim at the sentencing hearing regarding the total amount of loss."). The Federal Rules of Evidence do not apply to sentencing hearings, including restitution hearings. Fed. R. Evid. 1101(d)(3). The Act encourages victims to submit affidavits in support of restitution claims, but does not require them to do so as a condition of receiving restitution. 18 U.S.C. § 3664(d)(2). The more time that passes, and the more evidence that disappears, the harder it becomes for defendants to overcome these hurdles.

Loss of evidence over time is especially harmful when courts impose on defendants an affirmative burden to present evidence. Some courts have held that, if the Presentence Report (PSR) presents sufficient indicia of reliability, "[t]he defendant bears the burden of showing that the information in the PSR relied on by the district court is materially untrue." *Smith*, 528 F.3d at 425 (quotations omitted); *see also United States v. Prochner*, 417 F.3d 54, 65–66 (1st Cir. 2005) ("A PSR generally bears sufficient indicia of reliability to permit the district court to rely on it at sentencing. . . . The defendant may object to facts in the PSR, but if [his] objections to the PSR are merely rhetorical and unsupported by countervailing proof, the district court is entitled to rely on the facts in the PSR.") (citation and quotations omitted). Other courts have held that defendants bear the burden of establishing offsets to restitution amounts, under § 3664(j)(2), based on other sources of compen-

sation already received by victims. *See United States v. Crawford,* 169 F.3d 590, 593 & n.2 (9th Cir. 1999) (upholding restitution order in which "the district court placed the burden [of establishing offsets] on the defendant"); *United States v. Sheinbaum,* 136 F.3d 443, 449 (5th Cir. 1998) ("[J]ustice requires that the burden of establishing any offset to a restitution order should fall on the defendant.") (quotations omitted). And because information about offsets will often be uniquely within the victim's control, the defendant cannot control whether and to what extent that information is preserved over time.

Moreover, in calculating offsets and addressing other restitution questions, courts have often required defendants to provide extremely specific evidence, which can erode over time. Courts have required defendants to litigate a wide range of nuanced issues, including complex questions of securities valuation and even whether recovered assets were, in fact, part of the stolen sum. *See United States v. Gordon*, 393 F.3d 1044, 1052 (9th Cir. 2004) (considering victim's "lost opportunity to sell the Terayon shares at a higher price in determining the amount of the loss caused by Defendant's embezzlement of the shares" (quotations omitted)); *United States v. Taylor*, 128 F.3d 1105, 1111 (7th Cir. 1997) ("[The defendants] contend that because they stole only approximately $133,000 and because the police recovered more than $40,000, the total $100,000 restitution order is too high. What the defendants fail to recognize, however, is that the money recovered has not been returned to the bank, nor even proven to be part of the proceeds of the robbery.").

Whatever the merits of these decisions, they underscore that defendants have a significant need for evidence to contest broad restitution requests. Without time limits on restitution awards, the potential for lost evidence over time—and the corresponding prejudice to defendants—would be substantial.

2. The harms from the passage of time, including the potential for lost evidence, occur even when the defendant has diligently and vigorously prepared for trial. Notwithstanding the Court's holding in *Hughey v. United States*, 495 U.S. 411 (1990), courts frequently issue "orders of restitution that are much harsher than a defendant could have reasonably predicted from the indictment, the evidence presented at trial, or the defendant's admission of guilt during the plea colloquy." Melanie D. Wilson, *In* Booker*'s Shadow: Restitution Forces a Second Debate on Honesty in Sentencing*, 39 Ind. L. Rev. 379, 380 (2006).

For instance, in conspiracy and 'scheme' cases, defendants "are sometimes ordered to make restitution to 'victims' who were omitted from the indictment and never mentioned during the defendant's change of plea hearing and, occasionally, to persons identified for the first time weeks after the defendant's conviction." Wilson, *supra*, at 387. Under §§ 3663(a)(2) and 3663A(a)(2), "[s]o long as the indictment details a broad scheme encompassing transactions beyond those alleged in the counts of conviction, the district court may order restitution to victims who suffered from defendant's criminal activity beyond what was described with particularity in

the indictment." *United States v. Liner*, 435 F.3d 920, 926 (8th Cir. 2006) (citations omitted).[2]

In addition, and although the Act refers to those who are "directly and proximately harmed," 18 U.S.C. § 3663A(a)(2), restitution hearings have sometimes placed at issue losses that are indirect or contingent. *See, e.g., United States v. Oslund*, 453 F.3d 1048, 1063 (8th Cir. 2006) ("Because future income is income that is lost to the victim as a direct result of the crime, the plain language of the statute leads to the conclusion that lost future income can be included in a restitution order."). This type of analysis is complicated and fact intensive, and the risks to the defendant of evidentiary loss over time are significant—especially since courts have sometimes upheld awards supported by a mere "reasonable inference." *See, e.g., United States v. Schuster*, 467 F.3d 614, 617 (7th Cir. 2006) (upholding restitution award—based on theory that defendant's misuse of computer equipment led victim to switch service providers and lose productivity—because the "evidence was sufficient to *raise the reasonable inference* that Schuster had caused the inexplicable problems") (emphasis added).

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[2] *See, also e.g., United States v. Dickerson*, 370 F.3d 1330, 1342 (11th Cir. 2004) ("[W]here a defendant is convicted of a crime of which a scheme is an element, the district court must, under 18 U.S.C. § 3663A, order the defendant to pay restitution to all victims for the losses . . . [that] were caused by conduct outside of the statute of limitations."); *United States v. Boyd*, 222 F.3d 47, 50–51 (2d Cir. 2000) (Act "confers authority to order a participant in a conspiracy to pay restitution even on uncharged or acquitted counts") (citations omitted)..

* * *

In sum, with a streamlined process, and with some courts willing to uphold broad restitution awards based on modest government showings, the need for defendants to retain access to evidence is critical. By permitting restitution awards outside the 90-day limit, the Tenth Circuit's approach creates a substantial risk that evidence will be unavailable to defendants, leaving them unable to contest untimely restitution demands.

B. Untimely restitution determinations prevent defendants from meaningfully assisting in their defense.

A prompt determination of restitution is critical to enabling the defendant to assist counsel in litigating these claims. Because those convicted of federal crimes often serve their prison sentences far from the site of their trial, excessive delays impede communication between attorneys and clients and interfere with clients' ability to assist in their defenses.

Once defendants are sentenced to federal prison, they may be moved far away from the jurisdiction in which they have been tried and in which their counsel practice—making communication between attorneys and clients far more difficult. Under 18 U.S.C. § 3621(b), the "[t]he decision whether to designate a facility as a place of federal detention is plainly and unmistakably within the discretion [of the Bureau of Prisons]." *Abdul-Malik v. Hawk-Sawyer*, 403 F.3d 72, 76 (2d Cir. 2005) (quotations omitted). As a result, federal "facilities tend to be far

away from home," and federal inmates can "be transferred to a facility on the other side of the country." Christine Tartaro & David Lester, *Suicide and Self-Harm in Prisons and Jails* 3 (2008). Those convicted of federal crimes often serve their sentences hundreds of miles from the site of their trial. *See, e.g.*, Michael Hinkelman, *Kentucky Prison Far From Home for Fumo, In More Ways Than One*, Phil. Daily News, Sept. 1, 2009, at 6 (defendant tried in Philadelphia but serving sentence "more than 500 miles southwest of Philadelphia, in the northeast corner of Kentucky"); Val Walton, *Aliceville Is To Be New Home for State's First Federal Female Prison*, Birmingham News, Sept. 22, 2008, at 1A ("Currently, women convicted of federal crimes in Alabama are sent out of state, with the closest women's prisons in Tallahassee and Marianna, Fla.").

The Court has long recognized the importance of a criminal defendant's ability "to consult with counsel, and to assist in preparing his defense." *Drope v. Missouri*, 420 U.S. 162, 171 (1975). Yet "representing clients confined in distant prisons presents frustrating logistic and legal difficulties." *Imprisoned Citizens Union v. Shapp*, 473 F. Supp. 1017, 1028 (E.D. Pa. 1979). These difficulties are far more likely to arise when restitution determinations are delayed until long after the primary sentencing hearing.

C. Untimely restitution determinations subject defendants to gratuitous anxiety and uncertainty and stifle economic transactions.

When the time for an award of restitution is open-ended, the defendant is subject to gratuitous

uncertainty. For individual defendants—many of whom are indigent—this delay can impose increased anxiety about an additional financial consequence of undetermined size. For organizational defendants, the uncertainty about a large financial award can stifle commerce.

1. For individual defendants, the absence of a time limit for imposing restitution awards needlessly prolongs the criminal process and the anxiety that accompanies it. Courts have recognized the importance of protecting criminal defendants from gratuitous uncertainty and anxiety. *See, e.g.*, *United States v. Ewell*, 383 U.S. 116, 120 (1966) (speedy trial right "is an important safeguard . . . to minimize anxiety and concern accompanying public accusation"). Yet even after a conviction and a prison sentence, another variable looms large—even for defendants who have pleaded guilty to bring the proceedings to a prompt conclusion.

The imposition of gratuitous personal distress not only affects defendants' well being, but also can interfere with their rehabilitation. An "[i]mpaired emotional state, including elevated levels of . . . anxiety, may significantly affect the ability of ex-prisoners to successfully reintegrate into the general community." Alison J. Shinkfield & Joe Graffam, *The Relationship Between Emotional State and Success in Community Reintegration for Ex-Prisoners*, Int'l J. Offender Therapy & Comp. Criminology, Mar. 3, 2009, at 1, 2, *available at* http://ijo.sagepub.com/cgi/rapidpdf/0306624X09331443v1.

Delays also leave defendants uncertain about the proper time to appeal their conviction and sentence. As explained in Petitioner's brief (pp. 29–33), a judgment in a criminal case is not final until the district court has resolved all issues affecting a defendant's sentence. If a court has sentenced a defendant to prison but has not resolved the government's restitution request, a defendant is faced with an unenviable choice: either appeal a judgment which appears to be non-final (thus invoking federal appellate jurisdiction prematurely and depriving the district court of jurisdiction until the appeal is resolved), or delay his appeal until the court has issued a restitution order—even if that delay lasts months or years and lasts longer than the defendant's prison sentence. The defendant avoids this unfairness and uncertainty only if the Act's 90-day deadline is enforced.

2. For organizational defendants, uncertainty over restitution awards can stifle economic transactions, harming both the entities themselves as well as third parties who contract with them. When convicted of a crime, entities such as corporations may be subject to restitution orders. *See, e.g., United States v. Segal*, 495 F.3d 826, 836 (7th Cir. 2007) (reviewing restitution order against insurance brokerage corporation). Statutory limits on the assertion of claims serve "promptly to resolve disputes in order that commercial and other activities can continue unencumbered by the threat of litigation." *Elkins v. Derby*, 525 P.2d 81, 86 n.4 (Cal. 1974). "Unasserted potential claims may prevent or hinder prospective defendants from engaging in business transactions,

such as financings or mergers, until the risk of liability has been resolved. Such uncertainty also may limit a potential defendant's ability to allocate resources most efficiently." Tyler T. Ochoa & Andrew J. Wistrich, *The Puzzling Purposes of Statutes of Limitation*, 28 Pac. L.J. 453, 466 (1997). These concerns apply equally to lingering claims for restitution, and they will be exacerbated as the federal government increasingly targets organizational defendants such as corporations. *See* Exec. Order No. 13519, 74 Fed. Reg. 60121 (Nov. 19, 2009) (creating Financial Fraud Enforcement Task Force); Zachary A. Goldfarb, *Task Force to Take Up Financial Fraud Cases*, Wash. Post, Nov. 18, 2009, at A15.

3. Contrary to the Tenth Circuit's suggestion, delays do not inure to the benefit of defendants on the theory that "it is usually better to pay a dollar tomorrow than to pay one today." Pet. App. 21a. Some courts have ruled that restitution should include prejudgment interest; when restitution awards are delayed, prejudgment interest accumulates. *See, e.g., United States v. Molak*, 276 F.3d 45, 51 (1st Cir. 2002) (restitution statute "affords no latitude for excluding . . . interest, or costs from the required computation"); *Gov't of Virgin Islands v. Davis*, 43 F.3d 41, 47 (3d Cir. 1994) (prejudgment interest "is an aspect of the victim's actual loss which must be accounted for in the calculation of restitution in order to effect full compensation"). Because delays can be accounted for by prejudgment interest, and because they create uncertainty and inhibit appeals, defendants do not benefit from them.

II. The Tenth Circuit's Interpretation of the Act Would Burden Both Victims and the Courts.

The Tenth Circuit's decision undermines other purposes of the Act as well. In permitting open-ended delays in the awarding of restitution, the Tenth Circuit's approach encourages delay, to the detriment of both victims and the courts.

A. Noncompliance with the 90-day limit undermines Congress's goal of providing victims with "closure." 141 Cong. Rec. S19278 (1995) (statement of Sen. Hatch). Congress has mandated, in the Crime Victims Rights Act, that victims receive an award of restitution "free from unreasonable delay." 18 U.S.C. § 3771(a)(7). Enforcement of the Act's 90-day limit promotes this goal; untimely restitution determinations decrease the likelihood that victims will be compensated when their need is greatest. *See, e.g.*, *State v. Moen*, 919 P.2d 69, 74 (Wash. 1996) ("It is also in the victim's best interest to have restitution set in a timely fashion under [law] when evidence of loss is fresh and the victim's need often at its greatest."). And just as delays in restitution awards encumber the assets of organizational defendants, such delays also prevent organizational victims from deploying their assets most efficiently. *See, e.g.*, *United States v. Farkas*, 935 F.2d 962, 967–68 (8th Cir. 1991) (restitution sought by bank); *United States v. Youpee*, 836 F.2d 1181, 1184 (9th Cir. 1988) (restitution sought by insurance company).

B. Delayed restitution also diminishes its deterrent value. Restitution "forces the defendant to con-

front, in concrete terms, the harm his actions have caused"; "the direct relation between the harm and the punishment gives restitution a more precise deterrent effect than a traditional fine." *Kelly v. Robinson*, 479 U.S. 36, 49 n.10 (1986). Numerous courts have recognized that restitution is partly rooted in deterrence. *See United States v. Twitty*, 107 F.3d 1482, 1493 n.12 (11th Cir. 1997) (restitution is a "criminal penalty meant to have a strong deterrent and rehabilitative effect") (quotations omitted); *United States v. Brown*, 744 F.2d 905, 909 (2d Cir. 1984) ("The prospect of having to make restitution adds to the deterrent effect of imprisonment and fines, penalties that might seem to some offenders less likely to be imposed than restitution.").

As a deterrent, however, restitution becomes less effective over time. Economists recognize that "[b]ecause potential criminals tend to discount the future at higher rates than [the rest of] society, punishing crimes long after they are committed will be inefficient." Yair Listokin, *Efficient Time Bars: A New Rationale for the Existence of Statutes of Limitations in Criminal Law*, 31 J. Legal Stud. 99, 99 (2002). Thus, timely adjudication of restitution demands benefits victims, past and future.

C. Delayed restitution increases the likelihood of duplicative civil litigation. An award of "restitution may eliminate a crime victim's need to bring a separate civil action against a criminal offender in many cases." Don Rogers, *The Crime Victim's Constitutional Right to Restitution in Texas Criminal Proceedings*, 46-FEB Hous. Law. 18, 23 (2009). When

victims do not receive restitution promptly, they may resort to civil litigation. *See, e.g.*, *Corporacion Insular de Seguros v. Reyes-Munoz*, 849 F. Supp. 126, 130 (D.P.R. 1994) (lawsuit to recover losses caused by defendants, who pleaded guilty to federal criminal charges); *Doe v. Doe*, 551 S.E. 2d 257, 257–59 (S.C. 2001) (victims of sexual abuse brought civil suit against convicted parent). The greater the delay in ordering restitution, the greater the need for duplicative civil lawsuits—which burden victims, defendants, and the courts.

D. Delayed restitution could also generate piecemeal appeals. Serious constitutional concerns would arise if a defendant were required to postpone his entire appeal due to indefinite delays arising from the restitution component of the sentence. *See* Pet'r Br. at 30. As a result, the only way to ensure that a defendant had a timely appeal would be to permit a defendant to appeal twice: once to challenge the conviction and prison sentence, and a second time to challenge the restitution award. *Cf. Cherry v. State*, 15 So. 3d 774, 775 (Fla. Dist. Ct. App. 2009) ("This court has previously affirmed Mr. Cherry's judgment and sentence for misdemeanor possession of marijuana . . . . In this appeal, Mr. Cherry challenges only the restitution order that was entered after his judgment and sentence."). Even if, contrary to existing law, *see* Pet'r Br. 29, an appeal of an incomplete sentence could somehow be permitted, the district court might be divested of jurisdiction during its pendency, producing even more delay in the resolution of restitution claims. And if a disputed issue

then arose about the ultimate award of restitution, another appeal would result.

This type of duplication would undermine congressional intent "to streamline the administration of restitution within the criminal justice system." *United States v. Edwards*, 162 F.3d 87, 91 (3d Cir. 1998). Only by reversing the Tenth Circuit, and enforcing the 90-day limitation, can the Court avoid burdening the appellate courts while still protecting a defendant's right to appellate review that is meaningful and timely.

Conclusion

The Tenth Circuit's judgment should be reversed.

Respectfully submitted,

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March 2, 2010

AMICUS CURIAE BRIEF

No. 09-367

In The Supreme Court of the United States

BRIAN RUSSELL DOLAN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF OF AMICUS CURIAE THE NATIONAL CRIME VICTIM LAW INSTITUTE SUPPORTING RESPONDENT

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INTERESTS OF AMICUS CURIAE[1]

Amicus Curiae, the National Crime Victim Law Institute (NCVLI), is a non-profit educational organization located at Lewis and Clark Law School, in Portland, Oregon. NCVLI's mission is to actively promote balance and fairness in the justice system through crime victim-centered legal advocacy, education, and resource sharing. NCVLI accomplishes its mission through education and training; promoting the National Alliance of Victims' Rights Attorneys; researching and analyzing developments in crime victim law; and providing information to crime victims and crime victims' attorneys through its website, www.ncvli.org. NCVLI also participates as amicus curiae when a case presents an issue of national importance regarding crime victims' rights. NCVLI believes that a crime victim's statutory right to restitution, as provided by the Crime Victims' Rights Act, 18 U.S.C. § 3771, should inform the Court's decision in this case.

---

[1] No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amicus Curiae or its counsel made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief and have been given at least 10 days notice of Amicus' intention to file it.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Neither Petitioner Dolan nor Respondent United States cited a statute that is critical to the proper resolution of this case: the Crime Victims' Rights Act (CVRA). Pub. L. No. 108-405, § 102(a), 118 Stat. 2260, 2261-62 (codified as amended at 18 U.S.C. § 3771 (Supp. 2009)). The CVRA specifically promises crime victims that they will have a protected "*right* to full and timely restitution as provided in law." 18 U.S.C. § 3771(a)(6) (emphasis added). Further, the law commands that courts "shall ensure that the crime victim is afforded the rights" provided in the CVRA. 18 U.S.C. § 3771(b)(1). The victims in this case did not waive the right to restitution. With un-waived "rights" to restitution, as well as the congressional command to courts, firmly in mind, it is clear that the 90-day claims processing rule at issue in this case cannot strip crime victims of their entitlement to restitution.

The statutory landscape urged by Amicus does not leave criminal defendants without the ability to enforce the 90-day rule. A defendant who desires a restitution decision within 90 days need only request the same of the district judge. District judges can be presumed to follow the law. In the rare case where a district judge refuses to follow the 90-day statutory command, the defendant can then seek a writ of mandamus in the court of appeals to force compliance with the time limit.

Defendants, rather than crime victims, are properly assigned the responsibility of alerting district courts to the need to follow the 90-day rule. Criminal defendants, unlike crime victims, are constitutionally guaranteed legal counsel. The record in this case demonstrates the difficulties that crime victims without legal counsel face when attempting to secure restitution. This Court should not compound those problems by forcing crime victims to monitor and enforce a 90-day time limit.

ADDITIONAL FACTUAL BACKGROUND

Both Petitioner Dolan and Respondent United States recount the facts in this case as though the case presents a mere institutional dispute about who will cover some medical bills. The rule of law the Court announces in this case will, however, have tremendous impact on the lives of individual crime victims around the country – individuals like Evan Tissnolthtos. Mr. Tissnolthtos is a member of the Mescalero Apache Indian Tribe who at the time of the crime worked in maintenance. J.A. 26. Dolan brutally assaulted Mr. Tissnolthtos, and left him lying by the side of a road covered in blood. J.A. 23. Mr. Tissnolthtos was then taken to a hospital in critical condition, having suffered head injuries, broken ribs, and a broken nose. He required a ventilator to breath. J.A. 24. Although Mr. Tissnolthtos recovered substantially from the attack, he continues to suffer lingering effects from the injuries, such a headaches, blurred

vision, and numbness on the left side of his face. J.A. 26.

When contacted by the probation office, Mr. Tissnolthtos reported that he was employed at the time of the crime and had lost $7,000 in wages as a result of the attack. He also explained that he had been unemployed since the assault. As a result of the injuries he suffered, he is physically weaker and fears not being able to perform required job duties. J.A. 26. Mr. Tissnolthtos did not have a check stub from his job or letter from employer at the time of his interview with the probation office, but he indicated that he would make an attempt to provide such information later. J.A. 26-27.

When the probation office did not receive any further documentation from Mr. Tissnolthtos, it simply declined to recommend any restitution. The record does not contain anything suggesting that Mr. Tissnolthtos was informed of this decision of the probation office.

The court set Dolan's sentencing for June 28, 2007. Shortly before this sentencing date, the Government filed a motion to continue to permit the victim's sister to allocute at the sentencing hearing. J.A. 28. The district court granted the motion, setting sentencing for a later date. J.A. 30. The record is silent as to whether Mr. Tissnolthtos was ultimately informed of the time and place of the new sentencing hearing, and its impact on his right to restitution.

At the sentencing on July 30, 2007, the district judge asked whether any representatives of the

victim's family wanted to be heard. The prosecutor informed the court that there was a representative of the family, apparently the sister, but that she did not want to be heard. J.A. 34.

The district judge asked whether the victim advocate had been in contact with the victim. The advocate stated: "The agent was still trying to look for the victim, and I don't know – we're trying to work through his sister to see if we can locate him, through his sister, but there is a bill of $80,000 that's still outstanding from the hospital." J.A. 35. The judge then held the issue of restitution open, pending receipt of further information.

Ultimately, the court held another hearing on restitution more than 90 days later. At this later hearing, the Government did not indicate that it had made any further efforts to contact the victim and inform him that his right to $7,000 in restitution would be in jeopardy unless he provided additional documentation. The Government did, however, diligently follow up on its right to receive restitution for the Indian Health Service, ultimately obtaining an order for restitution in the amount of $104,649.78. The court did not order any payment in favor of the direct victim of the crime, Mr. Tissnolthtos.

ARGUMENT

I. THE DISTRICT COURT'S FAILURE TO ACT WITHIN 90 DAYS DOES NOT ELIMINATE A VICTIM'S RIGHT TO RESTITUTION UNDER THE CRIME VICTIMS' RIGHTS ACT.

A. The Crime Victims' Rights Act Affords Victims a Protected "Right" to Restitution.

The Crime Victims' Rights Act arose from the efforts of the crime victims' movement to gain broad and enforceable rights in the federal criminal justice process.[2] In April 2004, crime victims' advocates met with congressional leaders and decided to press for a far-reaching federal statute protecting victims' rights in the federal criminal justice system. Victims' advocates received near universal congressional support for a "broad and encompassing" statutory victims' bill of rights. 150 CONG. REC. S4261 (daily ed. Apr. 22, 2004) (statement of Sen. Feinstein).

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[2] For background about the Act, *see generally*, Jon Kyl et al., *On the Wings of Their Angels: The Scott Campbell, Stephanie Roper, Wendy Preston, Louarna Gillis, and Nila Lynn Crime Victims' Rights Act*, 9 Lewis & Clark L. Rev. 581, 591-92 (2005); Paul G. Cassell, *Recognizing Victims in the Federal Rules of Criminal Procedure: Proposed Amendments in Light of the Crime Victims' Rights Act*, BYU L. Rev. 835, 852-924 (2005); Paul G. Cassell, *Treating Crime Victims Fairly: Integrating Victims into the Federal Rules of Criminal Procedure*, Utah L. Rev. 861 (2007).

The Crime Victims' Rights Act gives victims "the right to participate in the system." 150 CONG. REC. S4263 (daily ed. Apr. 22, 2004) (statement of Sen. Feinstein). *See generally*, Douglas Evan Beloof, *The Third Model of Criminal Process: The Victim Participation Model,* Utah L. Rev. 289 (1999) (describing crime victim participation rights). The CVRA provides various rights for crime victims in the process, including the right to be notified of court hearings, the right to attend those hearings, the right to be heard at appropriate points in the process (including sentencing), and the right to be treated with fairness. 18 U.S.C. § 3771(a) (2006). Of particular relevance to this case, the CVRA promises victims that they will have "*the right* to full and timely restitution as provided in law." 18 U.S.C. § 3771(a)(6) (emphasis added).

This background about the CVRA is important because it demonstrates that Petitioner Dolan is wrong to suggest that "victims generally do not have standing to bring claims under the [Mandatory Victim Restitution Act]." Br. for Pet. at 25 n.12. Whatever may have been the accuracy of this claim before Congress passed the CVRA,[3] there is no doubt of its

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[3] Cases were split on this question before the October 2004 passage of the CVRA. *Compare United States v. United Security Savings Bank*, 394 F.3d 564, 567 (8th Cir. 2004) (per curiam) (concluding victim has no standing to challenge district court's decision on how to allocate restitution among victims) *with United States v. Perry*, 360 F.3d 519, 524-33 (6th Cir. 2004) (holding crime victim had standing under the Victim and Witness Protection

(Continued on following page)

inaccuracy now. The CVRA explicitly confers standing on victims to independently assert their rights – including their right to restitution under laws like the Mandatory Victim Restitution Act (MVRA), 18 U.S.C. § 3663. The CVRA provides that rights can be "assert[ed]" by "[t]he crime victim or the crime victim's lawful representative, and the attorney for the Government." 18 U.S.C. § 3771(d)(1). The CVRA also broadly provides that courts must "ensure that the crime victim is afforded" the rights contained in the law. *Id.* § 3771(b)(1).

These changes were intended to make victims "an independent participant in the proceedings." 150 CONG. REC. S10911 (daily ed. Oct. 9, 2004) (statement of Sen. Kyl). As the legislative history of the CVRA explains, "Without the ability to enforce the rights in the criminal trial and appellate courts of this country any rights afforded are, at best, rhetoric. We are far past the point where lip service to victims' rights is acceptable." 150 CONG. REC. S4269 (daily ed. Apr. 22, 2004) (statement of Sen. Kyl).

Act, as amended by the MVRA, to challenge district court's decision vacating victim's lien); *see also United States v. Kones*, 77 F.3d 66 (3d Cir. 1996) (allowing crime victim-patient to appeal denial of restitution after physician convicted of mail fraud).

B. Victims Do Not Waive Their Right to Restitution Under the Crime Victims' Rights Act Merely Because the District Court Fails to Act in a Timely Fashion.

At its core, Petitioner Dolan's argument is that the victims in this case waived the right to restitution guaranteed in the CVRA. Notably, if the right to restitution was not waived, then the plain language of the CVRA obligated the district court to order restitution.

The CVRA states that "[i]n any court proceeding involving an offense against a crime victim, the court *shall ensure* that the crime victim is afforded the rights described [in the CVRA]." 18 U.S.C. § 3771(b)(1) (emphasis added). The only way that a district court can "ensure" that a victim is afforded rights under the Mandatory Victim Restitution Act is to award restitution.

Congress enacted the CVRA after the MVRA. Therefore, even assuming the validity of Dolan's arguments about construing the MVRA, the CVRA's specific command that the court "shall ensure" that crime victims receive their rights – including their specifically promised right of restitution – would prevail over any general inference that a victim would lose restitution if the court did not act within 90 days. It is hornbook law that "[w]hen the plain import of a later statute directly conflicts with an earlier statute, the later enactment governs, *regardless* of its compliance with any earlier-enacted requirement. . . ." *Lockhart v. United States*, 546 U.S.

142, 149 (2005) (Scalia, J., concurring). Consequently, a district court would be in violation of the CVRA if it did not ensure a victim's right to restitution.

The victims in this case certainly did not waive the right to restitution. There is no evidence that, for example, Mr. Tissnolthtos, was even aware that a statutory deadline was involved in the restitution award, much less that he had some obligation to act before the passage of the deadline. Before a victim is found to have waived an important statutory right to restitution there should at least be some evidence that the waiver was informed and voluntary. *Cf. United States v. Olano*, 507 U.S. 725, 733 (1993) (finding procedures for determining waiver "all depend on the right at stake").

Indeed, in passing the CVRA, Congress was specifically concerned that victims should not be deemed to have waived their rights without clear evidence of a voluntary choice to do so. As the Senate co-sponsor of the legislation explained, "The rights provided in this bill are personal to the individual crime victim and it is that crime victim that has the final word regarding which of the specific rights to assert and when. Waiver of any of the individual rights provided can only happen by the victim's affirmative waiver of that specific right." 150 CONG. REC. S10912 (daily ed. Oct. 9, 2004) (statement of Sen. Kyl).

Nothing in the record in this case reveals an affirmative waiver of the right to restitution. Accordingly, the CVRA required the district judge to ensure

that the right to restitution was respected, and that required ordering restitution.

II. THE PROPER REMEDY WHEN A DISTRICT COURT FAILS TO ACT IN A TIMELY FASHION IS FOR A DEFENDANT TO SEEK PROMPT ACTION FROM THE DISTRICT COURT AND, IF NECESSARY, FROM THE COURT OF APPEALS.

A. A Defendant Who Needs a Restitution Order Imposed in 90 Days Can Obtain Relief from the District Court and Court of Appeals.

While Petitioner Dolan attempts to conjure the specter of an innocent defendant who serves months and months in prison, unable to appeal his sentence because the district court delays determining the final restitution calculation, Br. for Pet. at 30, the reality is that defendants can simply take an immediate appeal of any prison sentence, as the Government explains in its brief. Br. of the U.S. at pp. 25-26. Moreover, even if it were true that the defendant had to wait to take an appeal of the sentence until after the 90-day period, the defendant can simply request that the district judge follow the law and impose sentence within the 90-day period. There is simply no

reason to think that district judges will fail to comply with their statutory obligation when asked to do so.[4]

In this case, Petitioner Dolan never requested that the district court act within 90 days. Instead, so far as can be discerned from the record, he waited until the time limit had passed and then, essentially, cried "Gotcha!" Had he wanted a hearing within 90 days, everything in the record suggests that he could have obtained one by simply requesting one.

There remains, of course, the theoretical possibility that some district judge somewhere for some speculative reason might fail to honor a defendant's request for a restitution order within 90 days. Were such a case to arise, the defendant would still have a remedy: he could file a petition for a writ of mandamus with the appropriate Court of Appeals under 28 U.S.C. § 1651 and Federal Rule of Appellate Procedure 21. The Tenth Circuit was quite clear in

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[4] Notably, the cases in the courts of appeals in which compliance with the 90-day requirement has been at issue have involved purely benign reasons for delay. *See, e.g., United States v. Vandeberg*, 201 F.3d 805, 814 (6th Cir. 2000) (court entered order for restitution within 90-day time frame but later entered amended judgment); *United States v. Farr*, 419 F.3d 621, 622 (7th Cir. 2005) (judge ordered restitution "to be determined" but later probation officer discovered it has never been determined); *United States v. Maung*, 267 F.3d 1113, 1122 (11th Cir. 2001) (active negotiations between the Government and the defendant during the 90-day period produced restitution hearing after 90-day period).

its ruling that district courts are obligated to impose restitution within 90 days. As it explained:

> While we today decide the 90-day deadline is not a jurisdictional limit on the district court's authority to order restitution, our holding should *not* be misconstrued as suggesting the government has the discretion to seek, and the district court has discretion to enter, restitution on any time schedule they find convenient. The law remains that the district court *shall* enter a restitution order within 90 days. . . . District courts and the government must take steps to ensure compliance with the MVRA's deadline and the public interests it serves, just as they must with any other congressional command. Though district courts do not lose the authority to enter restitution after 90 days, the law remains the law and courts and the government alike are bound to follow it.

United States v. Dolan, 571 F.3d 1022, 1031 (10th Cir. 2009).

Under this understanding of the 90-day time limit, a writ of mandamus would lie from the court of appeals to a district court refusing to order restitution. This is true because the district court would "owe[] [a defendant] a clear nondiscretionary duty." *Cheney v. U.S. Dist. Court for Dist. of Columbia*, 542 U.S. 367, 392 (2004) (Stevens, J., concurring). Thus, a defendant would be protected were a district court to defy the law, and delay imposing restitution after the defendant had requested such an action.

B. Congress Has Not Authorized the Federal Courts to Shift the Burden of Enforcing the 90-Day Time Limit to Victims of Crime.

While it may be argued that a crime victim should bear the burden of notifying the trial judge of a pending 90-day deadline and pursuing an emergency writ of mandamus if it appeared that the trial judge were not going to act by the 90th day,[5] such argument should be rejected. As a practical matter, shifting the burden from defendants to crime victims would effectively mean that victims would often forfeit their right to restitution. This is true because most crime victims are without legal counsel to alert them to the passage of a statutory deadline, much less to pursue legal action before the district court and potentially the court of appeals to enforce their rights. While Amicus, the National Crime Victim Law Institute, helps support twelve pro bono legal clinics for crime victims around the country,[6] these clinics can provide legal support to only a tiny percentage of

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[5] On Petitioner Dolan's reading of the statute, a crime victim's mandamus petition on the 91st day would be moot, as the district court would have been stripped of jurisdiction to enter a restitution order after the passage of the 90th day. Dolan does not explain whether a crime victim's mandamus petition on the 89th day would be able to escape prematurity problems, since presumably the victims' right to action within 90 days would not be violated until the 90 days have passed.

[6] For a description of the works of these clinics, see http://www.ncvli.org/links.html.

crime victims. By contrast, criminal defendants have the assistance of counsel – even in cases in which they are indigent. *See Gideon v. Wainwright*, 372 U.S. 335 (1963).

The facts of this case demonstrate some of the difficulties crime victims face when trying to secure their legal rights; facts which strongly counsel against shifting legal obligations away from represented criminal defendants to unrepresented crime victims. Specifically, the record discloses what appear to be clear violations of victims' rights regarding restitution – violations that appear to have gone unnoticed because the individual victim was without legal counsel and the Government declined to press the victim's claim for restitution, separate from its own claim.

After the crime and Dolan's subsequent guilty plea, Mr. Tissnolthtos met with the probation office. He explained the grievous injuries he had suffered at the hands of Dolan and the economic consequences that were thrust upon him, both in terms of past lost income and future employment opportunities. After he indicated that his past lost income was $7,000, the probation officer asked him to produce a paycheck or letter from his employer. Mr. Tissnolthtos said that he would make this attempt. When the probation officer did not receive any such documents, the officer simply wrote in the presentence report that the victim "was unable to produce documentation of his employment and wage at this time. Therefore, at this time his request cannot be ordered." J.A. 27.

As a matter of law, this conclusion was wrong. First, the probation office was itself required to collect this information, rather than shifting the burden to the crime victim. Federal Rule of Criminal Procedure 32(d)(2)(B) requires that the probation office include in the presentence report "information that assesses any *financial*, social, psychological, and medical impact on any victim." (Emphasis added). No doubt the probation office involved in this case was quite busy, but that does not provide a justification for failing to collect the necessary information. Notably, such simple steps as calling the victim's employer may have revealed the information sought.

Even assuming that the probation office could properly require the victim to produce "documentation," the probation office erred in telling Mr. Tissnolthtos that the documentation had to come from the victim's employer in order for a restitution order to issue. Nothing in law requires employer documentation as a prerequisite to restitution. To the contrary, 18 U.S.C. § 3664(d)(2)(A)(vi) specifically provides that a victim can make a claim for restitution through his own affidavit. In fact, the probation office is required to "provide notice to all identified victims of . . . the opportunity of the victim to file with the probation officer a separate affidavit relating to the amount of the victim's losses subject to restitution. . . ." 18 U.S.C. § 3664(d)(2)(A)(vi). The probation office is further required to "provide the victim with an affidavit form to submit. . . ." 18 U.S.C. § 3664(d)(2)(B). Nothing in the record suggests that Mr. Tissnolthtos

was provided an affidavit form, which would have obviated the need for him to track down something from his employer.

The probation officer was also wrong to suggest that "documentation" from a past employer was required as a precondition to a lost income claim. Courts have interpreted the MVRA as allowing restitution for future lost income, even future lost income for homicide victims. *See, e.g., United States v. Serawop*, 303 F. Supp. 2d 1259 (D. Utah 2004), *rev'd on other grounds*, 410 F.3d 656 (10th Cir. 2005), *restitution order reaffirmed in*, 409 F. Supp. 2d 1356 (D. Utah 2006), *aff'd*, 505 F.3d 1112, 1121 (10th Cir. 2007) (upholding restitution award to estate of 3-month old homicide victim). In passing the CVRA, Congress specifically endorsed this interpretation of the restitution statutes. *See* 150 CONG. REC. S10911 (daily ed. Oct. 9, 2004) (statement of Sen. Kyl). Because Mr. Tissnolthtos was entitled to restitution for lost future income, the probation office should not have imposed on him an impossible-to-meet obligation of providing "documentation" of something that had not yet happened. Instead, the probation office should have asked him to provide an affidavit about the nature of the losses or collected information on this subject on its own initiative.

After the probation office determined not to recommend any restitution for Mr. Tissnolthtos in the presentence report, the record is devoid of any evidence that this decision was communicated to Mr. Tissnolthtos, or that his opportunity to challenge the

decision was clearly opened to him. All the record reflects is that the victim's sister came to the sentencing. There is nothing in the record that she was made aware that her brother was requesting restitution, or that the probation officer had declined to put forward that request. Nor does the record reveal compliance with the CVRA's mandate that the victim be given "reasonable, accurate, and timely notice" of the sentencing hearing. 18 U.S.C. § 3771(a)(2).

In sum, the record in this case should suggest to the Court the difficulties that crime victims around the country face when seeking their rights, even *mandatory* restitution. Crime victims are often indigent and without legal counsel. They are not knowledgeable in federal restitution law – much less the time limits contained in the procedural implementing provisions of such law.

In view of the asymmetry between defendants, who are represented by legal counsel, and crime victims, who almost always must proceed on their own, the Court should not shift the burden of enforcement of the 90-day rule to victims. Instead, that burden is properly assigned to defendants. Where necessary, defense counsel can file a motion demanding to have the 90-day rule enforced. When defense counsel fails to do so (as in this case), the defendant should not be heard to complain about such failure – much less use this failure to deprive victims of restitution to which they are lawfully entitled.

CONCLUSION

For the foregoing reasons, the Court should affirm the decision of the Tenth Circuit below.

Respectfully submitted,

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